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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY,
AMOCO PRODUCTION COMPANY and
CITIES SERVICE OIL AND GAS CORPORATION,
Petitioners,

v.

OLIVER S. BROWN, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Tenth Circuit correctly hold that this Court in *Blum v. Stenson*, 465 U.S. 886 (1984), authorized percentage attorney fee awards in common fund class actions without reference to the market value of the attorney services, even though the chosen percentage resulted in an award in excess of $10 million, and even though four other Circuits have rejected the percentage approach?

2. Is it consistent with a federal court's fiduciary duty to class members under Federal Rule 23(e) to award attorney fees based upon an arbitrary percentage of a common fund that far exceeds the market value of the services performed, and deny class members the protection against excessive attorney fees afforded to wrongdoing defendants in statutory fee cases?

3. Is the application of two totally different methods of calculating fee awards, the lodestar in statutory fee cases and a percentage of the recovery in common fund cases, consistent with the decisions of this Court holding that fee awards in the two types of cases should be "governed by the same standards?"

LIST OF PARTIES

Petitioners are Phillips Petroleum Co., Cities Service Oil and Gas Corporation and Amoco Production Company. Their statements pursuant to Rule 28.1 are reprinted in the Appendix beginning on App. p. 44a. Parties to the Consolidated Helium cases include three groups:

A. Helex Group; [a]

B. The lessee/producer group representing a class who supplied gas to pipeline companies; [b] and

C. The landowners group representing a class of royalty owners. [c]

The United States intervened as a party in the litigation, but did not appear at the trial level or before the Court of Appeals on the issue of attorney fees.

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[a] Panhandle Eastern Pipeline Company and National Helium Corporation (Panhandle); Northern Natural Gas Company, Northern Helex Corporation and Northern Natural Gas Products Company; Cities Service Gas Company, Cities Service Helex, Inc. and Cities Service Cryogenices, Inc. Since this appeal involved the payment of attorney fees from a settlement fund created by Panhandle, this Helex Group was disinterested in the questions presented by this appeal, and did not participate in it.

[b] Other named lessee/producers are Cabot Corporation; Helmerich & Payne, Inc.; Texaco Inc.; Ashland Oil & Refining Company; Dorchester Gas Producing Company; Mobil Oil Corporation; Gulf Oil Corporation; Diamond Shamrock Corporation; Superior Oil Company; Mapco Production Company; and Atlantic Richfield Company.

[c] The landowner group was represented by, among others, Oliver S. Brown. The landowners had no interest in the payment of attorney fees from the lessee/producer funds. This group did not participate in the appeal of this question.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 838 F.2d 451 and is reprinted at page 1a of the appendix. The orders of the district court are unreported but are reproduced at pages 12a and 21a of the appendix.

JURISDICTION

The opinion of the Court of Appeals for the Tenth Circuit was entered February 3, 1988. A timely petition for rehearing was filed, but was denied March 2, 1988. This petition is filed within 90 days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 23(e) provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This action was initiated in the early 1960's and was consolidated with other similar actions, all of which sought to adjudicate questions surrounding the extraction of helium from natural gas. Classes of royalty owners and lessee/producers claiming entitlement to compensation for helium extracted from natural gas were formed by court orders in 1967. The lessee/producer class was certified pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) and (B). After three trials and two appeals, settlement was reached with one helium extractor, resulting in that extractor depositing approximately $91 million into the court registry. This fund, with additional interest, was apportioned so that $16 million was reserved for a class of royalty owners and $76 million for a class of lessee/producers.

The claimant attorneys who prosecuted this action on behalf of their oil company clients had billed those clients periodically throughout the litigation and were paid for work performed in this case at rates up to $200 per hour. Although these claimants characterized these fees as "minimal" or "subsistence," these payments represented their customary hourly rate for complex litigation. Indeed, when the district court examined one of the counsel's financial relationships with its client it found that the client had compensated the counsel for "all services rendered." App. p. 19a.

The settlement agreement was submitted to the district court on October 16, 1984. Notice under Rule 23(e) was given to class members advising that attorney fees would be awarded and a hearing to approve the settlement would be held March 5, 1985. That notice made no mention of the amount of the fees class counsel would seek. Between February 20 and March 1, 1985, certain counsel filed fee applications that were not served on unnamed class members. These counsel submitted no detailed time records in those applications or at the March 5 hearing, relying instead on estimates of time expended in this litigation—claimed to be 18,000 hours.[1] Although counsel initially sought to justify their claims for compensation for all hours since 1963 by a computation utilizing hourly rates between $150 per hour and $200 per hour with multipliers of between three and four, counsel primarily relied in the district court upon the "percentage of the fund" approach to justify the requested multi-million dollar award.

Named class representative lessee/producers, Amoco Production Company (Amoco) and Mobil Oil Company, as well as the two largest beneficiaries of the class, Phillips Petroleum Company (Phillips) and Cities Service Oil and Gas Corporation (Cities) opposed the fee requests. Over their objection, the district court awarded 16.5 percent of the lessee/producer fund—over $12.5 million—in attorney fees and expenses.[2] After reimbursing

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[1] This claimed time includes adjustments, such as one counsel increasing his estimated time by 22 hours per month from June 1963 to April 1969 and an additional two hours per month for the remainder of the litigation, and another counsel adding 75 hours per year for each of the 20 years of this litigation because that time "probably wasn't recorded" or "could possibly not be billed." The district court found the claimed hours to be "reasonably acceptable" and although petitioners challenged this conclusion before the Tenth Circuit, that court did not address the point.

[2] $1.8 million of this amount was paid to the various lessee/producers who previously had paid attorney fees or advanced ex-

the class members that funded the litigation, class counsel was awarded in excess of $10.7 million in fees from the fund. The district court made the award, which was in addition to the contemporaneous fees paid throughout the litigation, without the district court performing a lodestar calculation or scrutinizing the individual efforts of class counsel. Instead, the court simply decided that 16.5 percent of the fund was "reasonable" without providing any explanation. Amoco, Phillips and Cities appealed.

The Tenth Circuit upheld the district court's percentage approach. Although it noted that the percentage method likely would be unacceptable if used to set a fee that a wrongdoing defendant would have to pay an injured plaintiff under a statutory fee provision, it found the process acceptable for assessing fees against a "common fund." Thus, the Tenth Circuit has granted district courts power to award attorney fees in all common fund cases completely unconstrained by the market value of an attorney's services as measured by multiplying the hours reasonably expended by a fair hourly rate. It awarded these attorneys a substantial portion of the class recovery, without even mentioning the fact that these attorneys received compensation as the litigation progressed.[3]

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penses to the claimant counsel. The court required no itemization of these expenses. It awarded these parties twice the amount claimed to have been advanced. Phillips objected to the complete absence of any evidence to show what the expenses consisted of and how they benefited the class, but this point was ignored by both the district court and the Tenth Circuit.

[3] The Tenth Circuit also failed to mention a position advanced by Cities. Cities was a named defendant lessee-producer in this action and always was represented by its own separate counsel. Class counsel refused to permit Cities to participate with them because Cities as lessor/producer was a sister company of Cities Helex, the helium extractor. Cities questioned whether it was proper to force it to pay fees of counsel who refused to represent it, when it was

The holding below has widespread implications.[4] Attorney fee awards from common funds occur in a variety of cases, such as product liability, mass tort, and toxic substance litigation, as well as in actions brought under statutes that provide for an attorney fee award when the case settles and creates a fund.

REASONS FOR GRANTING THE WRIT

An allowance of attorney fees from a common fund is an exception to the American Rule on attorney fees. That doctrine was set forth in *Trustees v. Greenough*, 105 U.S. (15 Otto) 527 (1882), and amplified in *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). The rationale underlying an award from a fund is that a party who receives a benefit without paying a share of the expenses of producing that benefit is enriched unjustly. An award to the party supporting the litigation, as in *Greenough*, or an award to an attorney who is not compensated fully by a named client, as in *Pettus*, allocates the burdens of the action to the parties that properly should bear them.[5] Any award under that

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denied any recompense for the fees of the counsel it was required to employ to protect its interests as a named defendant lessee-producer.

[4] The Tenth Circuit's largess already has paid dividends to these same attorneys. Judgments against the remaining extractors in the Consolidated Helium cases have created a fund in favor of the lessee/producers in an amount of $130.5 million. The district court held that the present decision was "binding" and awarded the same percentage of the fund for fees. It did so even though class members entitled to over 77 percent of the fund objected to the award. Combined with the award now before this Court, these attorneys will receive nearly $30 million in fees from the helium funds, *in addition to* the hourly fees they received as the litigation progressed.

[5] The present case contains elements of both *Greenough* and *Pettus*, since the award compensates both the parties that supported the litigation and the attorneys that prosecuted it.

doctrine is to be made with "moderation, and a jealous regard to the rights of those who are interested in the fund." 105 U.S. at 536.

In common fund class actions, the court exercises control over an attorney fee award under Rule 23. Court scrutiny is designed to protect class members since any award "harms the unrepresented claimant by reducing his net recovery." *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 169 (3d Cir. 1973). Because a court is called upon to award the funds of an unrepresented claimant to an attorney, fee awards draw public attention and are seen as reflecting on the court's "integrity, the integrity of the legal profession, and the integrity of Rule 23 * * *." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974).

By approving the percentage of the funds approach, the Tenth Circuit refused to protect class members against excessive fees by requiring that an award be predicated on hours worked at a reasonable hourly rate. That protection has been extended to class members by the Second, Third, Eighth, and District of Columbia Circuits. This refusal was based entirely upon the Court of Appeal's interpretation of a footnote in *Blum v. Stenson*, 465 U.S. 886 (1984). That footnote has given rise to controversy as to the correct standards to apply to determine fee awards in common fund cases, with courts reaching inconsistent results. Certiorari should be granted to resolve the conflict among the circuits as to the fee methodology in common fund cases and to eliminate the confusion created by this Court's footnote in *Blum*.

A percentage award departs from the equitable cost spreading ideas underlying *Greenough* and *Pettus*. Percentage awards prompted one commentator to remark that it was "in the calculation of fees that ideas derived from the *Greenough* case have wandered out into the open seas, out of sight of all known landmarks." Daw-

son, *Lawyers and Involuntary Clients In Public Interest Litigation*, 88 Harv. L. Rev. 849, 870 (1975). The methodology employed by the court below only will accelerate that drift. Certiorari should be granted so that this Court can reiterate that the purpose of common fund awards is to defray the expenses of litigation, and not merely to enrich counsel.

The award in this case is outrageous by any standard. Class counsel were given in excess of $10 million for this part of the Consolidated Helium litigation. This award established a precedent for them to receive an additional $19 million in the remaining portion of the Consolidated Helium litigation—a total of nearly $30 million. *Cities Service Gas Company v. Mobil Oil Corporation*, Civ. Actions No. KC 1945, KC 1946, KC 1947, KC 1948, KC 1969, Order on Applications for Expenses and Fees (unpublished D. Kan. April 27, 1988). These amounts were *in addition* to the regular hourly fees they collected from their clients as this case progressed. Class members were required to pay not only these amounts, but also to reimburse the named clients for all amounts they had paid these attorneys. The Tenth Circuit's approval of the percentage approach, resulting in such a huge fee award, heralds a return to the almost quixotic and unreviewable fee award practices of the past that engendered public criticism and loss of confidence. It constitutes such a departure from the accepted and usual course of judicial fee awards as to require this Court to grant certiorari to exercise its supervisory authority over the lower courts.

The Tenth Circuit's approach is inconsistent with this Court's holdings on statutory fee awards, which seek to award fees that objectively reflect the market value of services. By increasing the award that counsel can recover in fund cases, the court below undermined the holdings of this Court seeking to equate statutory fee awards with awards in other complex federal cases. Certiorari should be granted so that this Court can clar-

ify that its holding governing the standards for "reasonable" statutory fee awards are applicable to "reasonable" fee awards from funds.

I. Certiorari Must Be Granted To Resolve The Conflict Among The Federal Courts Concerning The Standards To Be Applied In Awarding Fees In Common Fund Cases And As To The Meaning Of Footnote 16 In This Court's Opinion In *Blum v. Stenson.*

A. *The fee methodology applied below directly conflicts with standards required by other Courts of Appeals.*

In *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973), the Third Circuit reversed a district court's application of the percentage approach to a fee award from a common fund. That court recognized the purpose of an award was "to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant." 487 F.2d at 167. It held that the product of reasonable hourly rates and reasonable time expended, adjusted for certain additional factors, represents "the only reasonably objective basis for valuing an attorney's services." *Id.*

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit reversed an award that was 15 percent of a settlement, finding that

> [t]he starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.

495 F.2d at 470.

In *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 883 (1975) and *National Treasury Employees Union v. Nixon*, 521 F.2d 317 (D.C. Cir. 1975), two more courts expressly recognized that the lodestar calculation provides the necessary objective basis for determining the value of an attorney's services in common fund cases.

The Tenth Circuit's decision reached the opposite conclusion, stating that an attorney's fee award can be determined on a percentage basis by evaluating the 12 factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The Court held that "the 'time and labor involved' factor need not be evaluated using the lodestar formulation." It permitted a district court to set a fee simply by reciting that one is reasonable—no objective basis was required. Instead of striving to determine the value of services, the court below expressly held that a court need not even look to the value of those services as shown in a lodestar calculation.

It allowed a court to dismiss the time and labor factor if the court believed that the "result obtained" justified a different award. The Tenth Circuit, however, did not view the results obtained by evaluating the settlement in light of the requested relief, as this Court did in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). Rather, it equated "results obtained" with the size of the fund. Under the holding below, counsel is rewarded not on the basis of labor expended or even on the basis of a job well done. The sole determinant seems to be the size of the fund recovered for the class members. This approach is contrary to the requirements of four other courts of appeal and has absolutely no basis in the equitable principles underlying fee awards from funds enunciated in *Greenough* and *Pettus*.

The existence of conflicting standards among the circuits on the measure of attorney fees gives counsel a personal stake in selecting a forum that will apply the

percentage approach. This Court must grant certiorari to eliminate the obvious inconsistency of treatment among the courts of appeal and the incentive to forum shop that the decision below created.

B. *Certiorari must be granted to resolve conflicting interpretations of footnote 16 in* Blum v. Stenson.

The sole support offered by both the Tenth Circuit and the district court for abandoning the lodestar calculation is a passage in a footnote to the majority opinion of Justice Powell in *Blum v. Stenson*, 465 U.S. 886, 900, n.16 (1984), stating:

> Unlike the calculation of attorneys' fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under Section 1988 reflects the amount of attorney time reasonably expended on the litigation.

The Tenth Circuit read this footnote as a determination by this Court that "a percentage calculation [is] a 'reasonable fee' in those cases." App. p. 4a.

The *Blum* footnote has led to considerable confusion, and inconsistency of interpretation by the lower federal courts. Several district courts have read it as establishing a separate standard for attorney fees in common fund cases.[6] Some courts have utilized the percentage

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[6] *E.g., Pavlidis v. New England Patriots Football Club, Inc.*, 675 F. Supp. 707 (D. Mass. 1987); *Edmonds v. United States*, 658 F. Supp. 1126 (D.S.C. 1987); *Pray v. Lockheed Aircraft Corp.*, 644 F. Supp. 1289 (D.D.C. 1986); *Basile v. Merrill, Lynch, Pierce, Fenner & Smith*, 640 F. Supp. 697 (S.D. Ohio 1986); *In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 749 (D.C. N.Y. 1985), *aff'd other grounds*, 798 F.2d 35 (2d Cir. 1986). See also *In re Continental/Midlantic Shareholders Litigation*, Civ. A. No. 86-6877 (E.D. Pa. 1987) (available in Westlaw) ("the Supreme Court has also indicated, albeit in dicta, that a different rule [from the lodestar] should govern attorney's fees awards under the common fund doctrine").

approach to limit awards when a lodestar award would consume too great a portion of the fund.[7] But other courts, including the Second Circuit, have declined to read this Court's footnote as changing the manner of calculating attorney fees in common fund class cases.[8] One court that did not interpret it as authorizing a percentage award noted that the percentage approach "has been heavily criticized and no recent cases have utilized it."[9] Another court noted the confusion surrounding the footnote, but still used the lodestar as the starting point.[10]

Commentators do not agree on the meaning of the footnote. It has been cited as a clear endorsement of the percentage method of computing attorney fees in common fund cases.[11] Another commentator termed the footnote a "misconstruction of current fee law rather than a considered dismissal of the *Lindy* methodology for common fund cases * * *."[12] The Third Circuit Task Force on Court Awarded Attorney Fees cited this footnote as recognizing the differences between fund and statutory fee cases[13] but recommended the use of a percentage

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[7] *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987); *Fickinger v. C.I. Planning Corp.*, 646 F. Supp. 622 (E.D. Pa. 1986).

[8] *In re Agent Orange Product Liability Litigation*, 818 F.2d 226 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 289 (1987); *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D. Colo. 1984).

[9] *Brewer v. Southern Union Co.*, 607 F. Supp. 1511, 1519 (D. Colo. 1984).

[10] *In re Wicat Securities Litigation*, 671 F. Supp. 726 (D. Utah 1987).

[11] H. Newburg, *Attorney Fee Awards* § 2.08, at 52 (1986).

[12] M. F. Derfner & A. D. Wolf, *Court Awarded Attorney Fees* ¶ 15.01, at 15-12 (1988).

[13] Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 250-51 (1985).

award only when it was agreed to by the parties after court supervised negotiations at the beginning of litigation.

Petitioners believe that an examination of the footnote in context shows that the Tenth Circuit's utilization of it in this case clearly was improper. "The statement is not considered *dictum* but is 'comment merely obiter,' see *Hawkes v. Hamill*, 288 U.S. 52, 59 [1933] * * *." *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 712 (10th Cir. 1971), *cert. denied*, 404 U.S. 951 (1971). This Court has warned repeatedly of the pitfall of elevating *dictum* to authority. Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821), advised that such statements "may serve to illustrate [the question before the Court], are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Certiorari should be granted so that the confusion created by the footnote can be ended. A decision by this Court on the proper procedure for computing awards of attorney fees in common fund cases is needed and will impact thousands, if not millions, of individuals, and will determine the payment of millions of dollars. Common fund cases include mass tort cases, many antitrust cases, securities litigation, shareholder derivative actions, and many other categories of federal court litigation. Virtually all class actions seeking monetary damages give rise to "funds" and spawn litigation over attorney fees. By setting a uniform standard for attorney fee awards this Court can reduce the amount of fee litigation and prevent excessive fee awards, which reflect adversely upon the integrity of the bar, the judiciary, and the class action device.

II. The Decision Below Represents A Radical Departure From The Usual Course Of Judicial Proceedings In Determining Fee Awards Requiring The Exercise Of This Court's Supervisory Authority.

A. *Certiorari must be granted to enforce the district court's fiduciary obligation under Federal Rule 23(e) to protect absent class members from excessive fee awards in common fund cases.*

An allowance from a common fund is based upon the equitable notion that a party who benefits from litigation should contribute its proportionate share to the expenses of that litigation. In a class action a fee petition presents unique problems that impose special burdens on a federal court. At the time a petition is presented to a district court, the defendant that created the fund no longer cares about its allocation. Absent class members —few of whom are ever before the court—typically are dispersed widely, have little knowledge about the action, and have a relatively small financial interest. *Dunn v. H. K. Porter Co.*, 602 F.2d 1105, 1109 (3d Cir. 1979). The attorney that represented the beneficiaries is in a direct financial conflict with the beneficiaries at this point.[14] That attorney occupies "essentially an adversarial relation to their clients who face a reduced award to the extent that counsel fees are maximized." *Id.* As a result, there is no adversarial process that can be relied upon to establish a reasonable fee. The only protection available is the proper discharge by the district court of its obligation under Rule 23(e). Even the Tenth Circuit recognized the "fiduciary" role of the district court in protecting class members from excessive awards. App. p. 9a.

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[14] In cases such as this one in which the named parties also are seeking fees from the fund, they too may possess a direct financial conflict with the absent class members. At the very least, the pendency of such a claim may well decrease the incentive these class representatives would have to oppose an attorney fee award.

Because the task of assessing litigation expenses arises outside the normal adversarial context, it is imperative that courts adhere to guidelines for determining a reasonable award. Rather than providing guidance to district courts to ensure that class members are protected, the Tenth Circuit abdicated to district courts the power to give away a portion of the fund to class attorneys in an arbitrary fashion, without regard to the value of their services.[15]

The Tenth Circuit has freed the district courts from any duty to anchor an award in a determination of the market value of the attorney's services and has relaxed the obligation to make specific objective findings to support the fee award. This has shifted the burden of proof away from the fee claimants to establish that the fee sought is reasonable, and imposed a burden upon the class members to prove that the requested fee is clearly unreasonable. The absence of any objective criteria, coupled with the discretion accorded a district court by the decision below, affords a class member with no protection against an excessive award to overreaching counsel.[16] The class member is at the mercy of a whimsical selection of a percentage generated by the subjective fancy of the district judge that happens to hear the case.

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[15] This approach threatens to give credence to one distinguished critic's view that the primary purpose of common fund fee awards is "to augment the income of lawyers." Dawson, *Lawyers and Involuntary Clients: Attorney Fees From Funds*, 87 Harv. L. Rev. 1597, 1653 (1974).

[16] The size of the fund magnifies the impact of a percentage award. In this portion of the Consolidated Helium cases, each percentage point awarded reduces the class removery by $760,000. Notwithstanding the impact that even a small adjustment in the percentage awarded has on the class, the court below required no specific explanation how a particular percentage was reached. If all the Consolidated Helium cases are considered, a one percent award of the lessee/producer fund reduces the class recovery more than $2 million.

To allow counsel to recover fees based solely upon an arbitrary percentage unconstrained by the market value of the attorneys' services changes the class attorney's role. Under the ruling below, a class attorney automatically claims a portion of the recovery, and is likely to be among the largest beneficiaries of the lawsuit. Basing class counsels' fees on the extent of damages suffered by the class does not further the historic purpose of common fund awards—to prevent unjust enrichment of persons who obtain the benefit of a lawsuit without contributing to its costs. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). To the contrary, it reinforces the conception of the lawyer as "an independent profitmaking entrepreneur" and allows counsel to receive much more than the true market value of the services at the expense of the class members. See Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 Harv. L. Rev. 849, 853-54 (1975).

One might agree with judicial expressions of dismay over fee disputes, since these conflicts almost universally are regarded as "delicate, embarrassing, and disturbing." *Milwaukee Towne Corp. v. Loew's Inc.*, 190 F.2d 561, 569 (7th Cir. 1951). Nevertheless, this Court should not permit the lower federal courts to avoid their obligation under Rule 23 by simply awarding an arbitrary percentage, thereby declaring open season on class members who typically will be unrepresented at the fee stage of the litigation.

Paying attorneys more that the market value of their work for prosecuting common fund class actions undoubtedly will lead to a proliferation of these cases. The prospect of making more by these common fund cases will "fuel the filing of nuisance litigation 'in which settlement becomes the main object and attorney fee awards an overpowering motivating force.'" *In re Agent Orange Product Liability Litigation*, 818 F.2d 226, 235 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 289 (1987),

quoting In re Agent Orange Product Liability Litigation, 611 F. Supp. 1296, 1311 (E.D.N.Y. 1985). To permit a fee award measured by the size of the action is to encourage races to Bhopal because the more clients a lawyer can gather, the greater his fee. Class actions increasingly will become "a fruit tree planted in a lawyer's garden." *Illinois v. Harper & Row Publishers*, 55 F.R.D. 221, 224 (N.D. Ill. 1972).

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), this Court sought to afford wrongdoing defendants in statutory actions a degree of protection against excessive fees comparable to that enjoyed by any other attorney's client. "It would be inconceivable that the prevailing party should not be required to establish at least as much to support a [fee] claim * * * as a lawyer would be required to show if his own client challenged the fees." 461 U.S. at 440 (Burger, C.J. concurring). By refusing to apply these standards in common fund cases, the decision below stripped the involuntary, innocent class members of these protections this court has accorded wrongdoing defendants in statutory actions.

This question, although of great importance and frequently at issue in the lower courts, rarely will reach the Courts of Appeal, let alone this Court. That will happen only when a class member takes an active part in the fee hearing and has a great enough stake to justify prosecuting an appeal. Because this case is one of those unusual instances and the questions are graphically presented, certiorari should be granted to enable this Court to give guidance to the lower courts.

B. *Certiorari must be granted to reverse the district court's arbitrary and unreviewable fee award.*

The touchstone of any fee award is "reasonableness." This Court has held that this requires more than a subjectively reasonable award. "To be 'reasonable,' the method for calculating a fee award must be not merely

justifiable in theory but also objective and nonarbitrary in practice." *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. ——, 107 S. Ct. 3078, 3090 (1987) (*Delaware Valley II*) (O'Connor, J., concurring in part and concurring in the judgment). The Tenth Circuit's upholding of an arbitrary, multi-million dollar percentage fee is inconsistent with the requirement that a reasonable award be "objective and nonarbitrary."

The award below is one of the most munificent awards made in any reported case. Its generosity is difficult to rationalize since the reasons customarily given for making extraordinary awards simply are not present here. Counsel received compensation during the course of this litigation making augmentation for risk inappropriate.[17] The size of the fund, which the Court below equated with "results obtained," reflects the span of the litigation more than the achievements of counsel since the fund largely consists of interest. Nor is working for large oil companies for hourly compensation likely to be shunned by many attorneys. The contract and utility regulation issues upon which this case turned, although complicated, were not particularly complex, since those issues involved the type of work attorneys normally perform.

Although the Tenth Circuit purported to justify the district court's 16.5 percent award by comparing it to percentages of other funds awarded as attorney fees, in truth the award is not comparable if it is viewed in terms of the value of the services provided. Compared with other lengthy and complex cases—in all of which attorney fees were entirely contingent and no contemporary fees were paid counsel—awarding the attorneys $10.7 million for 18,000 claimed hours *in addition to* the hourly fees they collected and retained during the litigation is

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[17] The Tenth Circuit did not justify the award on the basis that counsel risked not being compensated.

unsupportable and shows the arbitrary character of the district court's action.[18] Although the attorneys in the Consolidated Helium cases claim to have worked approximately the same hours as all attorney time allowed in *In re Agent Orange Product Liability Litigation*, the percentage award of the $206.5 million fund in all the Con-

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[18] Recent complex cases have compensated counsel at less than $200 per hour: *In re Agent Orange Product Liability Litigation*, 818 F.2d 226 (2d Cir.), *cert. denied*, —— U.S. ——, 108 S. Ct. 289 (1987) (39,300 hours, $7.61 million award); *Lightfoot v. Walker*, 826 F.2d 516 (7th Cir. 1987) (6,600 hours, $710,000 award); *Rogers v. Okin*, 821 F.2d 22 (1st Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 709 (1988) (approx. 9000 hours, $870,000 award); *In re Burlington Northern, Inc. Employment Practices Litigation*, 810 F.2d 601 (7th Cir. 1986), *cert. denied*, —— U.S. ——, 108 S. Ct. 82 (1987) (12,200 hours of attorney time, 5,200 hours of paralegal time, award $2.18 million); *Malchman v. Davis*, 761 F.2d 893 (2d Cir. 1985), *cert. denied*, 475 U.S. 1148 (1986) (10,283 hours, $1.91 million award); *Ramos v. Lamm*, 632 F. Supp. 376 (D. Colo. 1986) (9,522 hours, $1.06 million award); *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258 (E.D. Wash. 1986) (12,452 hours, $1.7 million award); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 613 F. Supp. 824 (S.D.N.Y. 1985) (9,788 attorney, 6,000 paralegal, $1.5 million award); *Bogosian v. Gulf Oil Corp.*, 621 F. Supp. 27 (E.D. Pa. 1985) (32,758 attorney hours, 15,460 clerk/paralegal time, $5.8 million award). Other complex cases have compensated counsel at between $200 and $300 per hour: *Bebchick v. Washington Metropolitan Area Transit Commission*, 805 F.2d 396 (D.C. Cir. 1986) (6,000 hours expended over 22 years of litigation resulted in $1.675 million award); *In re MGM Grand Hotel Fire Litigation*, 660 F. Supp. 522 (D. Nev. 1987) (57,000 hours attorney time, 20,500 paralegal/clerk time, $15.6 million fee); *Weiss v. York Hospital*, 628 F. Supp. 1392 (M.D. Pa. 1986) (11,785 hours, $3.2 million award); *Harmsen v. Smith*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92379 (S.D. Cal. 9/30/85) (12,421 hours, $3.5 million award). Two reported cases have awarded attorney fees approaching $400 per hour: *In re Beverly Hills Fire Litigation*, 639 F. Supp. 915 (E.D. Ky. 1986) (10,477.58 hours, $4.12 million award); *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D. Colo. 1984) (22,190 attorney hours, 17,865 paralegal/clerk hours, 6,019 research consultant hours, $10.5 million award). None of these cases approaches the award of six or seven hundred dollars per hour in this action.

solidated Helium cases generates a fee that is four times the amount awarded to all counsel in *Agent Orange*. This disparity does not even account for the regular hourly compensation, at rates up to $200 per hour, that these attorneys collected from their clients as this litigation progressed.

Moreover, computing fees upon a percentage basis following a subjective review of some *Johnson* factors eliminates any opportunity for meaningful appellate review. Without a lodestar analysis or any objective criteria as a yardstick, "the subjective nature of the determination a trial judge must make when an award is not anchored in the seemingly more objective lodestar formula," [19] can be overturned for an abuse of discretion only if the amount, or the percentage, is so large as to "shock the conscience" of the court. *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952). Dawson, *Lawyers and Involuntary Clients In Public Interest Litigation*, 88 Harv. L. Rev. 849, 930 (1975). The lack of any objective factors to gauge a percentage award will lead to increasing variations in fees from case to case, and from judge to judge. The lack of any standard to control these awards will result in massive inconsistency within and among circuits. Allowing huge attorneys fee awards to be justified simply by trumpeting that a percentage is "reasonable" will reinforce the perception by some members of the public that lawyers take care of their own.

This Court has stressed that "[i]t remains important * * * for the district court to provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Nothing but a rote catechism of factors was offered to justify the present award. Certiorari must be granted so that

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[19] App. p. 9a.

this Court can exercise its supervisory authority to ensure that such arbitrary and unreviewable awards will not be tolerated.

C. *Certiorari must be granted because the district court's award amounts to an "accomplishment fee" that is inconsistent with this Court's decisions.*

What the court below awarded appears to be little more than an "accomplishment fee." The award of $10.7 million is more than 13 times the amount these attorneys charged their clients for prosecuting this case in their contemporaneous bills and statements. In the free market for attorney services, "accomplishment fees" are sometimes, although rarely, paid by clients in their sole discretion and out of generosity born of gratitude.

By authorizing an "accomplishment fee" whenever favorable results are obtained, and solely for that reason, the decision below has told district courts in the Tenth Circuit that an "accomplishment fee" is a legitimate charge that they can require every class member in every common fund case to pay. Class members thereby are denied the right of an ordinary client to exercise discretion in deciding to give financial thanks to an attorney. It is not a proper judicial function to mandate generosity to the bar. An "accomplishment fee" that enriches counsel and bears no relationship to the value of an attorney's services can only push the *Pettus* and *Greenough* doctrines even further from their origins. Such an award no longer advances the equitable purpose it was designed to serve.

If "there is no basis for determining the reasonableness of attorney fees by a different standard simply because they are to be paid by the defendants and not by counsel's client," *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846, 859 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952), there should be no basis for a different standard when fees are to be paid

by involuntary clients. They should not be denied the rights afforded both voluntary clients and defendants. This Court should grant certiorari and unequivocally announce that class members have as great an interest in a fund held by a court for their benefit as voluntary clients or defendants in a statutory fee case have in the proper computation of the fees they must pay. Innocent class members should be entitled to the same protections afforded wrongdoing defendants in statutory fee cases—attorney fees based upon objective standards and reflecting the reasonable value of services rendered.

III. Certiorari Must Be Granted To Reverse The Court Below Because Unfettered Allowance Of A Percentage Of Recovery As A Fee In Common Fund Cases Undermines The Standards Applied In Statutory Fee Cases And Destroys The Equivalence Between Statutory And Other Fee Awards That Congress Intended.

In recent years, this Court has defined clearly the standards for statutory attorney fee awards, holding that the starting point is the number of hours reasonably expended multiplied by a reasonable hourly rate. "This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This calculation (the lodestar) has been held to reflect various factors, including the novelty and complexity of the issues, *Blum v. Stenson*, 465 U.S. 886, 896 (1984), the quality of representation, *id.* at 899, and even the results obtained and the benefit conferred, *id.* at 900. Although adjustment of the loadstar is possible, see *Hensley v. Eckerhart*, *supra* (results obtained enhancement), *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 483 U.S. ——, 107 S. Ct. 3078 (1987) (contingency enhancement), the Court has required careful articulation of the circumstances justifying the adjustment—rejecting "a mere conclusory statement that

this fee was reasonable in light of the success obtained." *Hensley*, 461 U.S. at 439, n.15.

In mandating the adjusted lodestar approach as the way to arrive at a reasonable fee awardable under statutory provisions, this Court has sought to fulfill the Congressional intent "that the amount of fees awarded * * * be governed by the same standards which prevail in other types of equally complex Federal litigation, such an antitrust cases," S. Rep. No. 94-1011, p. 6 (1976), cited in *Hensley*, 461 U.S. at 430, n.4. That Senate Report was quoted again in *Blum v. Stenson*, 465 U.S. 886, 893 (1984), and Congressional intent underpinned the holding that a reasonable fee is one at prevailing market rates. This Court has continued to reaffirm a standard that parallels the private fee market and to equate statutory awards with fees in other complex litigation. *City of Riverside v. Rivera*, 477 U.S. 561 (1986); *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, 478 U.S. 546 (1986); 483 U.S. ——, 107 S. Ct. 3078 (1987).

The decision below undermines this Court's holding that a lodestar calculation equates statutory fees to fees in other complex federal litigation. By computing attorney fees in common fund cases without referring to the value of services rendered, fees from funds no longer will equate with this Court's valuation of attorney services in statutory fee cases. If fees in federal common fund cases are not subject to limits created by the market value of attorney time, fees in statutory cases can be comparable only if they also are freed from that constraint. The Tenth Circuit has relegated attorneys who litigate under federal statute to a second class status and assured that they no longer will be compensated on a par with attorneys who pursue federal common fund litigation.

The decision below also threatens goals served by statutory fee provisions by creating a strong disincentive to

seek statutory fees from a wrongdoing defendant. Whenever there is a prospect of a large recovery on behalf of a class under a federal statute that contains a fee provision, it is in the overwhelming economic self-interest of the class attorneys to settle the case without including any payment of their fees by the defendant. That frees class counsel to petition the district court for an arbitrary percentage of the "common fund" in excess of a reasonable lodestar-based fee. Although that arrangement may still fulfill the Congressional objective of encouraging attorneys to take such cases, it removes the burden of that cost from the wrongdoing defendant, upon whom Congress imposed it, and transfers it to the injured parties by reducing the settlement fund.

Moreover, since many statutory fee cases will settle rather than be adjudicated, there will be inconsistency of fee awards within that category of cases. A fee award in a statutory fee case that goes to trial will be based on a lodestar analysis; a fee award in a settled statutory fee case may be based on a percentage of the recovery. As demonstrated by this case, those amounts can be vastly different. The inescapable perception will be that wrongdoing defendants pay much lower fees than innocent, injured, involuntary clients in class actions.

Permitting allowance of arbitrary fee awards in common fund cases will lead to greater confusion and more litigation in both common fund and statutory fee cases. Certiorari should be granted so that this Court can articulate the relationship between fee awards in statutory and common fund cases and prevent arbitrary awards in common fund cases from undermining this Court's fee award standards in statutory fee cases.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

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Date: May 31, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 85-1788, 85-1789, 85-1892 and 85-1912

OLIVER S. BROWN, *et al.*,
Plaintiffs,

v.

PHILLIPS PETROLEUM COMPANY, *etc., et al.*,
Defendants-Appellants,

MOBIL OIL CORPORATION, *et al.*,
Defendants,

ASHLAND OIL, INC., *et al.*,
Defendants-Appellees.

Feb. 3, 1988

Rehearing Denied March 2, 1988

Before McKAY, TACHA, and BALDOCK, Circuit Judges.

TACHA, Circuit Judge.

This case arises out of a complex series of cases that has been in litigation since the early 1960s. The underlying cases involve generally the ownership and valuation of helium extracted by National Helium Corporation and sold to the federal government from 1963 to 1973. The only issues on appeal and cross-appeal in this case are (1) whether the trial court abused its discretion in awarding attorneys' fees on the basis of a percentage of

a common fund, and (2) whether Ashland Oil is precluded from recovering a share of the common fund because of a prior holding of this court. We affirm the court's award of attorneys' fees and hold that Ashland Oil is not precluded from recovering from the common fund. We remand for a determination of appropriate attorneys' fees in the cross-appeal.

The issues litigated in this series of cases related to right to payment for and valuation of helium extracted from natural gas from the Hugoton and Panhandle areas of Kansas, Oklahoma, and Texas. The parties in this appeal are members of the class of lessee producers who obtained judgment in 1983 establishing that they were entitled to a specified amount for the helium extracted by National Helium Corporation. *National Helium Corp. v. Panhandle Eastern*, No. KC-1980 (D.Kan. Nov. 3, 1983). After appeals were taken from that judgment, the parties settled the protracted controversy by agreeing to payment for the helium at a rate of $3.60 per thousand cubic feet plus interest. That settlement agreement requiring National Helium to pay approximately ninety-one million dollars was submitted to the court on October 16, 1984. The landowners' share of the settlement was approximately sixteen million dollars and the lessee producers' share was approximately seventy-five million dollars. Several law firms that represented various lessee producers and had represented the class of lessee producers through most or all of the class action litigation filed applications for attorneys' fees and expenses to be paid from the lessee producers' common fund recovery of seventy-five million dollars. These law firms (class counsel) represented appellees and cross-appellants in this case. The fee applications were accompanied by reconstructed time records and other documentation of time spent and work performed. The applications sought attorneys' fees in addition to payments the attorneys had received throughout the course of the litigation.

After appropriate notice to the producer class members and landowners, the trial court held hearings on a motion to approve the settlement agreement and on the applications for attorneys' fees and litigation expenses. Appellants in this case, three lessee producers, opposed the fee applications. The district court approved the settlement agreement and awarded class counsel an amount equal to 16.5% of the lessee producers' seventy-five million dollar share of the common fund. Appellants challenge the courts' decision to award attorneys' fees based on a percentage of the common fund. They claim that the award should have been based upon an analysis of the hours reasonably spent multiplied by a reasonable hourly rate.

I.

An award of attorneys' fees is a matter uniquely within the discretion of the trial judge who "has intimate knowledge of the efforts expended and the value of the services rendered." *United States v. Anglin & Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944), *cert. denied*, 324 U.S. 844, 65 S.Ct. 678, 89 L.Ed. 1405 (1945). We view the award here in the context of approximately twenty-five years of litigation including several state and federal district court cases, at least six appeals to this circuit, massive discovery and evidentiary development, and several thousand docket entries. The total record of related cases in this matter is among the largest ever amassed in this circuit. Perhaps most significantly for the questions before us, the district court judge who determined the attorneys' fee award was involved in substantially all of this litigation. His experience with and knowledge about the course of the litigation compels appellate court deference to his determination in the absence of an abuse of discretion. *Lucero v. City of Trinidad*, 815 F.2d 1384, 1386 (10th Cir. 1987).

The fee the trial court establishes must be reasonable. In statutory fee cases "the most useful starting point for

determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This formulation, generally known as the lodestar method, provides the starting point for appellate court review of statutory fee awards to determine whether a trial court has abused its discretion. The trial court in this case expressly did not rely on a lodestar analysis of class counsel's fee application. Failure to rely, to some extent, on a reasonable lodestar analysis would in most statutory fee cases constitute an abuse of discretion. *Ramos v. Lamm*, 713 F.2d 546, 552-57 (10th Cir. 1983). Here we must first decide whether a fee award based on a percentage of a common fund, in a case not involving statutory fees, is *per se* unreasonable. If it is not, we must then determine whether the trial court in this case abused its discretion nonetheless.

The Supreme Court has, in our judgment, answered the first question presented here. In *Blum v. Stenson*, a statutory fee case, the Court stated: "*Unlike the calculation of attorney's fees under the 'common fund doctrine' where a reasonable fee is based on a percentage of the fund bestowed on the class*, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation." 465 U.S. 886, 900, n. 16, 104 S.Ct. 1541, 1550, n. 16, 79 L.Ed.2d 891 (1984) (emphasis added). Not only does this language implicitly recognize basic differences in the rationale for calculating attorneys' fees in common fund cases, but the Court also explicitly described a percentage calculation as a "reasonable fee" in those cases. We hold, therefore, that the award of attorneys' fees on a percentage basis in a common fund case is not *per se* an abuse of discretion.

The award of attorneys' fees is based on substantially different underlying purposes in a common fund case than in a statutory fees case. The common fund doctrine

"rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980). Common fund fees derive in part from the common law premise that a trustee is entitled to reimbursement from the fund administered. *Trustees v. Greenough*, 105 U.S. (15 Otto) 527, 532, 26 L.Ed. 1157 (1881). Fees in common fund cases are extracted from the predetermined damage recovery rather than obtained from the losing party. Thus, common fund fees are neither intrinsically punitive nor designed to further any statutory public policy. Conversely, statutory fees are intended to further a legislative purpose by punishing the nonprevailing party and encouraging private parties to enforce substantive statutory rights. *See* H. Newberg, *Attorney Fee Awards*, § 2.06 (2d ed. 1986); *see generally*, Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 FRD 237 (1985). Thus, unlike statutory fees, which result in a *shifting* of the fee burden to the losing party, common fund fees result in a *sharing* of the fees among those benefited by the litigation. As the footnote in *Blum* recognizes, another important difference is that normally a large number of people or entities benefit from a common fund case while the number benefited is not "a consideration of significance in calculating in the award of statutory attorneys' fees." *Blum*, 465 U.S. at 900 n. 16, 104 S.Ct. at 1550 n. 160.

Notwithstanding these differences, the percentage reflected in a common fund award must be reasonable; and, as in the statutory fee cases, the district court must "articulate specific reasons for fee awards to give us an adequate basis," *Ramos*, 713 F.2d at 552, to review the reasonableness of the percentage and thus the reasonableness of the fee award. To determine reasonableness, federal courts have relied heavily on the factors articu-

lated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), in calculating and reviewing attorneys' fees awards. *See e.g. Ramos*, 713 F.2d at 552. Because these factors measure the attorneys' contributions, they are also appropriate in setting and reviewing percentage fee awards in common fund cases. The *Johnson* factors are: (1) the time and labor involved; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) any prearranged fee—this is helpful but not determinative; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d at 717-19.

The trial court in this case found

> that the amount represented by this percentage is reasonable and is required to adequately compensate such counsel for the legal services performed in this litigation for the following reasons: The extraordinary complexity and protracted nature of this helium litigation since July, 1963; the amount of time spent by each of counsel as reflected in the evidence, which evidence is accepted by the Court; the high quality of the service performed; the novelty of the issues; the number of adverse parties and the quality of opposing counsel; the vast number of hotly contested issues at all stages of this litigation; the number of cases, hearings, appeals and other proceedings conducted by counsel, the vast number of documents, exhibits, records and other materials required to be reviewed, analyzed; the vast amounts of legal research required on many novel substantive and procedural issues; the nature of the arrangements by

> such counsel for payment from clients of only minimal or subsistence fees pending conclusion of the cases and the highly contingent right of recovery from the interpleader fund in view of the debatable legal issues relating to liability and valuation; the skill and tenacity of counsel in conducting settlement negotiations and in refusing to accept very substantial and appealing, but inadequate, settlement offers at an earlier time; the enormously beneficial result conferred thereby upon the members of the Class. Such legal services were performed without unnecessary duplication and in an efficient manner.[1]

There is ample evidence in the record to support each of the reasons relied upon by the trial judge. The court here clearly considered all of the relevant *Johnson* factors and applied them appropriately. The trial judge considered the time and work involved. The record contains documentation supporting the time claims. The court records in this litigation attest to the novelty and difficulty of the questions presented. This trial judge personally observed many of the relevant stages of this series of cases and thus was in a unique position to judge the skill requisite to perform the legal service properly as well as the experience, reputation, and ability of the attorneys. The court specifically relied on these factors in establishing the percentage. The record contains evidence that a substantial portion of the work of class counsel for many years was devoted to these cases, and thus precluded or reduced their opportunity for other employment. The "customary fee" factor in a common fund case is the same as the factor suggesting consideration of awards in similar cases. We note that a review

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[1] In its final order the district court amended the portion of its proposed order that contained these findings. The court stated, however, that it intended only that its final order be "incorporated and integrated" with the affected part of the proposed order; there was no intent to supersede these findings and not only are they unaffected by the final order, but they clearly support it.

of other federal common fund cases demonstrates that a 16.5% attorneys' fee award is clearly within the range of awards deemed reasonable by other courts in similar or less lengthy and less complex cases.[2]

The facts underlying both the "time limitations" factor and the "length of the professional relationship with the client" factor are evident from the remarkable length of class counsel's representation and the litigation itself. Finally, as we have observed, a decisive factor in this common fund class action case is the amount involved and the results obtained. In evaluating this factor the trial judge appropriately balanced the interests of the beneficiaries in light of the efforts of counsel on their behalf.

Although the *Johnson* factors are relevant in determining a reasonable fee in a common fund case, the inherent differences between statutory fee and common fund cases could justify a trial judge's decision to assign different relative weights to those factors in the two types of cases. For example, the first factor—time and labor required—is an essential touchstone for recovery in a statutory fee case where reasonableness is measured in part by reference to the lodestar analysis. In a common fund case, however, although time and labor required are appropriate considerations, the ninth

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[2] *See, e.g., In re New York City Municipal Securities Litigation,* [1984 Transfer Binder] Fed.Sec.L.Rep. (CCH), Para 91,419 (S.D. N.Y.1984) (33%) [Available on WESTLAW, 1984 WL 2411]; *In re Warner Communications Securities Litigation,* 618 F.Supp. 735 (S.D.N.Y. 1985), *aff'd,* 798 F.2d 35 (2d Cir.1986) (24.5%); *Murphy v. Presly Co.,* [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH), Para. 97,975 (C.D.Cal.1981) (22.7%); *Van Gemert v. Boeing Co.,* 516 F.Supp. 412 (S.D.N.Y.1981) (37.3%); *Bullock v. Kircher,* 84 F.R.D. 1 (D.N.J.1979) (25.2%); *Jezarian v. Csapo,* 483 F.Supp. 385 (S.D. N.Y. 1979) (23.7%); *Valente v. Pepsico, Inc.,* [1979 Transfer Binder] Fed.Sec.L.Rep. (CCH), Para. 96,921 (D.Del.1979) (27%) [Available on WESTLAW, DCT database (1979 WL 1229)]; and *Rothfarb v. Hambrecht,* 649 F.Supp. 183 (N.D.Cal.1986) (22%).

Johnson factor—the amount involved and the results obtained—may be given greater weight when, as in this case, the trial judge determines that the recovery was highly contingent and that the efforts of counsel were instrumental in realizing recovery on behalf of the class. We recognized in *Ramos*, 713 F.2d at 552, that rarely are all of the *Johnson* factors applicable; this is particularly so in a common fund situation. We hold here only that in awarding attorneys' fees in a common fund case, the "time and labor involved" factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record.[3]

We are mindful of the subjective nature of the determination a trial judge must make when an award is not anchored in the seemingly more objective lodestar formula. The trial judge in a common fund case must "act as a fiduciary for the beneficiaries" of the fund. Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 251 (1985). Attorneys' fees necessarily reduce the amount that the common fund beneficiaries recover. Instead of serving as an arbiter in an adversarial setting, as is the case in a statutory fee controversy, the trial judge must determine a reasonable fee by weighing the appropriate interests of the beneficiaries in light of the efforts of counsel on their behalf. The need for meaningful appellate review in these cases requires the trial court to articulate clearly the

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[3] Even though the "time and labor involved" factor does not necessarily anchor the determination of reasonable fees in the common fund situation, it is a relevant factor and the availability of contemporaneous time records enhances the trial court's ability to properly evaluate it. The attorneys in this case did not consistently maintain contemporaneous time records. In part this failure must be attributed to the fact that such records were neither generally kept nor required during part of the period this litigation was pending.

factors and supporting evidence that it relies upon. The trial judge in this case met this requirement. We find no abuse of discretion in the award of an amount equal to 16.5% of the common fund where the relevant *Johnson* factors were considered and the court's determination is supported by evidence in the record.

II.

One of the cases not tried by this trial judge and the subject of the cross-appeal was *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 364 F.Supp. 6 (N.D.Okla. 1973), which was filed in the Northern District of Oklahoma and resulted in this court's en banc decision approving the workback valuation method for valuing the helium. *Ashland Oil Inc. v. Phillips Petroleum Co.*, 554 F.2d 381 (10th Cir.1975) (en banc), *cert. denied*, 434 U.S. 921, 98 S.Ct. 396, 54 L.Ed.2d 278 (1977). This method was then employed in the remainder of the cases that were tried in the district court in Kansas.

Cross-Appellant, Ashland Oil Co. (Ashland), seeks reversal of the district court's determination that Ashland is foreclosed from seeking an award of fees and expenses because of this court's holding in *Ashland I*. That case, however, was in a different posture than the case on appeal here. We denied an award of attorneys' fees in 1975 because we construed the litigation at that time as "plain and simple commercial litigation" involving two competing parties—one of whom would recover against the other. *Ashland*, 554 F.2d at 392 (quoting *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 130, 94 S.Ct. 2157, 2165, 40 L.Ed.2d 703 (1974)) The posture of the case now is quite different: Ashland is one of several beneficiaries of a common fund. The amount of recovery against the liable parties is fixed.

Our analysis here of the purposes of attorneys' fee awards in common fund cases as a form of fee sharing rather than fee shifting, demonstrates that a common

fund case is quite different from simple commercial litigation where one party recovers from another and attorneys' fees are generally not recoverable. Here Ashland is not attempting to recover attorneys' fees from Phillips in an amount over and above the amount of liability—such an attempt *is* precluded by this court's *Ashland I* holding. Rather, Ashland is seeking attorneys' fees *out of an amount established* as the total award. Thus, the percentage of the common fund recovery that Ashland now seeks differs markedly from the fee request considered by this court in *Ashland I*. Therefore, we hold that our *Ashland I* holding does not preclude Ashland from receiving an award of attorneys' fees and costs in this case if, in the opinion of the trial court, such an award is justified and warranted. We therefore reverse the district court on the cross-appeal and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. KC-1980

(Consolidated with Civil Action Nos. KC-1946, KC-1947, KC-1948, and KC-1969)

NATIONAL HELIUM CORPORATION,
Plaintiff,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendant and Third-Party Plaintiff,

RALPH GROUNDS and HENRY HITCH,
Defendants,

vs.

ASHLAND OIL & REFINING COMPANY, *et al.*,
Third-Party Defendants.

No. W-4613

OLIVER S. BROWN, *et al.*,
Plaintiffs,

vs.

MOBIL OIL CORPORATION, *et al.*, and
CITIES SERVICE GAS COMPANY, *et al.*,
Defendants.

SETTLEMENT PROCEEDINGS

ORDER ON LESSEE-PRODUCERS ATTORNEYS' FEES AND EXPENSES

The only question which has hindered the orderly progress in the execution of the Panhandle-National Helium Settlement Agreement stems from the objections interposed by Amoco Production Company ("Amoco"), Phillips Petroleum Company ("Phillips"), and Cities Service Oil and Gas Company ("Cities") to the methodology used in the determination of the amount of reasonable attorneys' fees and expenses to be awarded to the class representatives of the lessee-producers and their counsel out of the lessee-producers' gross share of the Panhandle-National Helium Settlement Fund.[1] We must point out at this juncture that each of these complaining gas producing companies will receive from this Settlement substantial sums of money from the helex companies[2] solely by the reason of their being class members of the lessee-producer class in this long-enduring helium litigation. Phillips had in fact attempted to withdraw as a class member by disclaiming any of its rights to and interests in a recovery, but was unsuccessful.[3] In

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[1] We wholeheartedly share Justice Powell's view who, writing for the Court in *Henseley v. Eckerhart*, —— U.S. ——, 103 S.Ct. 1933, 1941 (1984), stated that "[a] request for attorney's fees should not result in a second major litigation." Irrespective of his teaching, the dispute stemming from the inability of the parties to reach an amicable compromise on the amount of attorney's fees in this Settlement has, in fact, developed into a "second major litigation."

[2] Phillips will receive approximately $12,000,000, and Cities will obtain approximately $9,120,000 for each of their 7/8th working interests out of the present Settlement. While Amoco's recovery in this Settlement is comparatively smaller, approximately $1,000,000, its ultimate recovery in the unsettled portion of the *Consolidated Helium Cases* now on appeal would exceed $30 million if the judgment is affirmed.

[3] *See* Proceedings May 6, 1966, Dkt. No. 787, Tr. pp. 8, 9; Proceedings Feb. 15, 1967, Dkt. No. 1186, Tr. pp. 25, 26, 30, 56; Liability Trial, Tr. Vol. I, p. 44, Dkt. No. 1257; Special Requested Findings by Phillips March 1, 1968, Dkt. No. 210 in KC-1980.

their effort to minimize the services rendered by counsel for the lessee-producer representatives, it is clear that the primary purpose of Amoco, Phillips, and Cities is to obtain a larger proportional share of the fund.

The Court heard evidence on the issue of attorneys' fees and expenses to be allowed to counsel for the lessee-producer class on March 5, 6 and 7 of 1985. On March 7, 1985, Phillips, joined by Cities and Amoco, sought leave to adjourn and continue the hearing for the purpose of retaining and presenting expert witnesses for their opinion testimony on the issue of reasonable attorneys' fees. The Court found that while all parties had full and complete notice of the hearing on this issue several months prior to the hearing of March 5, 1985, the hearing would be continued until March 25, 1985; and that an interim prehearing conference should be conducted on March 18, 1985.

An additional plenary hearing was held on the issue of attorneys' fees and expenses to be awarded on March 25 and 26 of 1985, when the parties rested. Phillips continues to contend that there is insufficient evidence in this record to sustain the Court's findings for a reasonable attorneys' fee in this Settlement. The Court has reviewed the files, heard all of the testimony, examined all relevant documents submitted into evidence during the hearing on March 5, 6, 7, 25 and 26 of 1985, and considered the briefs and arguments of counsel. The Court now makes the following rulings on the only issues in dispute for the implementation of this Settlement. We believe that an award of expenses and attorney fees in an amount equal to 16.5% of the lessee-producers' share of the Settlement Fund at this time is a reasonable and conservative award required to adequately compensate the class representatives and counsel for the legal services performed and expenses incurred in this litigation for the purpose of this Settlement. We further find the repayment of the advance expenses to the

lessee-producer class representatives hereinafter named and the award of attorneys' fees will place such class representatives on an equal basis with approximately 500 unnamed class members of the lessee-producer class who have benefitted by but not contributed financial support to this class litigation.

The following class representatives of the lessee-producer class since 1963 have advanced certain sums for legal fees and expenses to finance and to sustain the prosecution of the lessee-producers' claim which eventually ripened into this partial settlement. The Court finds that each of these representatives, under the tutelage of their counsel, have adequately and diligently represented all members of the lessee-producer class. These representatives should be reimbursed from the Settlement Fund for their individual contributions, together with an appropriate interest allowance. The interest will be computed on the same basis as that interest allowed by this Court's October 18, 1983 Opinion of the *Consolidated Helium Cases*, KC-1980. The average interest allowance on these advancements, so calculated, is approximately the same amount as the principal advanced. On this basis, the class representatives listed hereinafter should recover an interest allowance and the principal as follows:

Amoco Production Co. (45% of $122,470.00 [4]) x 2	$110,223.00
Ashland Oil, Inc. (45% of $437,129.68 [5]) x 2	$393,416.70

[4] Amoco has contributed approximately $122,470.00 to the Joint Expenses Fund, in addition to the periodic payments of attorneys' fees and expenses it has paid directly to its Wichita counsel of Gott, Young & Bogel in the total sum of $258,016.97. (Amoco Exh. 9).

[5] The Foulston Firm which represents Ashland Oil, Inc., in this litigation has also claimed 45% of approximately $502,764 for fees and expenses incurred in the trial of *Ashland Oil, Inc. v. Phillips Petroleum Co.*, 364 F.Supp. 6, 15 (D.C.Okla. 1973), *rev'd*, 554 F.2d

Atlantic Richfield Co. (45% of $164,243.69) x 2	$147,819.32
Dorchester Gas Producing Co. (45% of $32,826.72) x 2	$ 29,544.04
Cabot Petroleum Corp. (45% of $189,021.88) x 2	$170,119.70
Helmerich & Payne Corp. (45% of $77,326.64) x 2	$ 69,593.96
Texaco, Inc. (45% of $149,757.64) x 2	$134,781.86
Gulf Oil Corp. (45% of $111,966.48) x 2	$100,769.84
Mobil Oil Corp. (45% of $350,176.16) x 2	$315,158.54
Mapco Production Co. (45% of $92,087.89) x 2	$ 82,879.10
Superior Oil Co. (45% of $35,838.29) x 2	$ 32,254.46
Diamond Shamrock (45% of $55,042.78) x 2	$ 49,538.50

381, 392 (10th Cir. 1975) (en banc). *See* LPX-C revised. For the purpose of this Settlement, we wish to make plain that the *Ashland* case substantively is a direct offshoot of the *Consolidated Helium Cases*. The various valuation issues litigated in *Ashland Oil* were an integral and interrelated part of, and later were consolidated with the Kansas cases on appeal in the Circuit Court for the purpose of reviewing the various generic factual and legal issues commonly intertwined in these cases. We are of the opinion that the efforts of Ashland Oil and its counsel directly benefitted the present settlement fund, and the work of counsel in such interrelated proceedings should be considered in determining the fees and expenses allowed in this Settlement. We, however, must exclude this sum of expenses and fees claimed in the *Ashland* case, *supra*, because the Circuit Court has ruled that such an award of fees and expenses was not appropriate in that case; and thus, they could not be recovered indirectly in this case.

Panhandle-National has incurred $33,877.10 in publication expenses, two-thirds of which under the terms of the Helium Settlement Agreement are to be reimbursed from the lessee-producers' share of the Settlement Fund. The Court finds that it is reasonable to award Panhandle-National $22,584.71 from the share of the Settlement Fund allocable to the lessee-producers.

Cities Service Oil and Gas Company (successor to Cities Service Oil Company) has been a member of the lessee-producer class in W-4613. In KC-1980, it only acted as a class representative in defending adverse claims, not as a representative in pursuing a recovery. In this connection, the only contribution Cities Service Oil and Gas Company has had was its participation in replenishing from time to time the Joint Expenses Fund. The amount of that contribution is allocated to this Settlement, plus the interest allowance, totals $32,869.78 (45% of $36,521.97) x 2. We find such sum should be awarded to Cities Service Oil and Gas Company.

The lessee-producer class representatives have incurred and will incur other expenses estimated at this time to total $125,000.00. These expenses should be paid from the lessee-producer class' share of the Settlement Fund. The law firm of Foulston, Siefkin, Powers & Eberhart, as agent for such lessee-producer class, shall, under the supervision of the Court, pay and account for the necessary bills and expenses so paid, and file an accounting statement reflecting the payment thereof within thirty days after the final pay-out of the Fund.

We believe that an allowance of 16.5% is a proper charge against the lessee-producer class' share of the Fund and is a reasonable and fair compensation for the expenses incurred and services rendered in representing the lessee-producer class in connection with this Settlement. There is no issue as to the division of attorneys' fees between the representatives of the class, and we will not disturb their agreed upon allocation of attor-

neys' fees allowed after payment of all proper advances to the class representatives as noted above. The lodestar formula commonly used in determining the applications for attorney fees in cases when such an award is authorized by a specific statutory provision is not, in our opinion, legally applicable to this "common fund case" and equitably appropriate under all of the facts and circumstances of this litigation, *see Blum v. Stenson*, —— U.S. ——, 104 S.Ct. 1541, 1549 note 16 (1984). We believe that the award of attorneys' fees less expenses on a percentage basis from a fund recovered for the benefit of the class in this case is not inappropriate, *see Boeing Co. v. Van Gemert*, 444 U.S. 472, 478-491, 62 L.Ed.2d 676, 681-682 (1980). We point out that if we had attempted to adopt the lodestar formula, the lessee-producers' attorneys would have met with ease all of the applicable lodestar standards for the determination of a reasonable and fair fee for the services rendered to the class. *See Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

In the early phase of this litigation, counsel and their clients found no necessity to maintain detailed records for services rendered. The task undertaken to reconstruct these time records retrospectively for the lodestar formula calculation was not made any easier when some of those counsel who sowed the seeds of their labor in this litigation have not lived to enjoy the fruits of their toil. We have examined the reconstructed records carefully. With this Court's intimate involvements and observations from presiding in this litigation since its filing in 1963, we find the expended hours claimed in the verified fee applications and the attached affidavits to be reasonably acceptable as one part of a lodestar formula determination. *See Ramos v. Lamm*, 713 F.2d 546, 553 note 2 (10th Cir. 1984).

The Amoco's contention that the payments of attorney fees to its Wichita counsel of Gott, Young & Bogel in the total sum of $242,035 during the progress of the

Consolidated Helium Cases for all services rendered by them is sustained. (Phillips Exh. S-9; Amoco Exh. 5; Affidavit of Nortorn Standevern; Krol, Tr. of March 26, 1985, at pp. 153-154; Hickman, Tr. of March 26, 1985, at pp. 163-164.) The Court finds that the Gott, Young & Bogel firm was employed in this helium litigation by Amoco pursuant to Amoco's employment policy of outside counsel. Amoco has paid the law firm of Gott, Young & Bogel for the legal services it rendered to Amoco from June 23, 1964 through January 31, 1985 in the *Consolidated Helium Cases* and *Brown v. Mobil Oil Corp.*, W-4613. (Phillips Exh. S-9). It follows that such a contention has precluded the reimbursement of such payments as costs in this Settlement proceeding. Its payments to the Joint Expenses Fund in this class action are reimbursable as noted above, however.

The percentage portion of expenses and fees awarded to lessee-producer class representatives and to their counsel set forth hereinabove shall be deducted and paid from the Fund to be disbursed to and for the account of the lessee-producer class members as provided in the Helium Settlement Agreement. In the event any party should appeal the assessment of attorneys' fees and expenses heretofore determined by this Court, twenty percent (20%) of that appealing lessee-producer's share of the Helium Settlement Fund attributable to its working interest ownership shall be severed and the balance thereof shall be paid to that lessee-producer. As to the severed portion of the fund, it shall be retained by the Clerk of this Court for investment in the U. S. Treasury Bills for a period not to exceed one (1) year subject to further Orders of the Court.

The Court specifically orders that the Helium Settlement Fund, except for the severed portion, shall be paid out to those parties not objecting to and appealing from the Court's Order, in accordance with the time schedules being set forth in the Helium Settlement Agree-

ment. Those parties objecting and appealing the Order for attorneys' fees and expenses shall comply with all procedural requirements for consummation of all payments and shall pay the royalty interests as provided heretofore in the Helium Settlement Agreement, notwithstanding their objections to the attorneys' fees and expenses as determined and awarded to the lessee-producer class representative and counsel therefor in this Settlement.

Accordingly, the provisions beginning from paragraph 20 on page 26 to paragraph 21 on page 32 of the Proposed Order Approving Helium Settlement Agreement are amended. Pursuant to the findings and conclusions set forth in this Order on Lessee-Producers' Attorneys Fees and Expenses, the rulings decreed herein are incorporated in and integrated with the Proposed Order Approving Helium Settlement Agreement. The Proposed Order Approving Helium Settlement Agreement, having been amended and conformed accordingly, is approved.

So Ordered.

Date this 13 day of May, 1985.

/s/ Wesley E. Brown
WESLEY E. BROWN
United States District
Senior Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. KC-1980

(Consolidated with Civil Action Nos. KC-1945, KC-1946, KC-1947, KC-1948, and KC-1969)

NATIONAL HELIUM CORPORATION,
Plaintiff,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendant and Third Party Plaintiff,

RALPH GROUNDS and HENRY HITCH,
Defendants,

v.

ASHLAND OIL & REFINING COMPANY, *et al.*,
Third-Party Defendants.

Civil Action No. W-4613

OLIVER S. BROWN, *et al.*,
Plaintiffs,

v.

MOBIL OIL CORPORATION, *et al.*, and
CITIES SERVICE GAS CO., *et al.*,
Defendants.

ORDER APPROVING HELIUM SETTLEMENT AGREEMENT

On the 5th day of March, 1985, there came on for hearing the Joint Motion for Approval of Helium Settlement Agreement, which motion was filed in the above captioned cases by those parties who entered into such agreement as of July 17, 1984, to-wit:

> Helex Companies, Panhandle Eastern Pipe Line Company (Panhandle) and National Helium Corporation (National); and Landowners, Robert Larrabee and Vincent Youngren by and through their counsel, acting individually and as representatives of the members of Landowner Classes described in paragraph numbered (2) of the Helium Settlement Agreement; and Amoco Production Company, Ashland Oil, Inc., Atlantic Richfield Company, Cabot Petroleum Corporation, Diamond Shamrock Corporation, Dorchester Gas Producing Company, Helmerich & Payne, Inc., Mapco Production Company, Mobil Oil Corporation, The Superior Oil Company and Texaco, Inc. by and through their counsel, acting individually and as representatives of the Lessee-Producer classes as described in paragraph numbered (3) of the Helium Settlement Agreement.

Definitions

For the purposes of this Order, the following terms shall have the meanings indicated, to-wit:

Clerk—means the Clerk of the United States District Court for the District of Kansas.

Helium Settlement Agreement—means the settlement agreement entered into as of July 17, 1984, by the parties as set out above, a copy of which is attached to the Joint Motion for Approval of Helium Settlement Agreement.

Helex Companies—means Panhandle, National, National Distillers and Chemical Co., a Virginia corporation, and all of their subsidiaries, affiliates, and the successors and assigns of all such companies.

Input Point—means a point on the Panhandle pipeline system which receives natural gas delivered to it and ultimately available for processing at the plant of National.

National—means National Helium Corporation.

Panhandle—means Panhandle Eastern Pipe Line Company.

Person—means either a natural individual, concern, or other legal entity.

The Court Settlement Fund—means the funds which have been paid or will be paid by Panhandle to the Clerk as recited in paragraph numbered (5) of the Helium Settlement Agreement.

KC-1980—means Case No. KC-1980 as appearing on the caption hereof.

W-4613—means Case No. W-4613 as appearing on the caption hereof insofar as the case covers severed claims relating to helium extracted by National's plant.

Supplier—means a Lessee-Producer who has supplied helium-bearing natural gas to National's plant. The term includes Lessee-Producers and pipeline companies who supplied gas under exchange agreements.

First-tier Supplier—means a Supplier who supplies such gas directly to Panhandle.

Second-tier Supplier—means a Supplier who supplies such gas to a First-tier Supplier.

General Findings

After examining the Court files of the captioned cases, hearing sworn statements of counsel and evidence offered

by the parties, and considering the arguments and authorities of all parties duly appearing and desiring to be heard, the Court finds and orders:

1. This Court has jurisdiction of the subject matters involved in KC-1980 by virtue of 28 U.S.C.A. § 1335, Fed. R. Civ. P. 22, and related statutes as previously held by this Court and affirmed by the Circuit Court of Appeals for the Tenth Circuit. 327 F.2d 1003 (10th Cir. 1964).

2. This Court has previously fully considered and overruled motions to remand W-4613 to the state court and has determined that this Court has jurisdiction of the subject matter involved in W-4613 by virtue of 28 U.S.C.A. § 1441(b) and (c). The Court has severed the claims in Case W-4613 relating to the helium extracted by National's plant. The Court again determines that it has jurisdiction of the parties and subject matter as to these severed claims.

3. The Landowner classes previously established and certified by the Court are the following:

(as described in Civil Action No. KC-1980):

> . . . the persons, firms and corporations owning a mineral interest in land from which helium has been, or is being, or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being or will be taken into possession by the United States of America in Seward County, Kansas at the delivery point described in that certain contract between the United States of America and plaintiff in interpleader National Helium Corporation dated October 13, 1961.

and

(as described in Civil Action No. W-4613):

All persons and concerns who own or have owned a mineral interest in land as to which helium has been, is being or will be severed from the ground in connection with or because of production under oil and gas leases, which helium has been, is being, or will be removed from gaseous streams flowing from wells productive under such leases, with such removal being done in . . . [a plant] in Seward . . . [County], Kansas, . . . owned by National Helium Corporation, or who have been, are entitled to or will be entitled as lessors, to royalty payments by reason of the production or marketing or natural gas pursuant to such leases since the beginning of such removal of such helium from such streams in such . . . plant and the heirs, executors, administrators, trustees and assigns of such persons; the officers, successors, trustees, and assigns of any such concern as are existing, dissolved or dormant corporations; the executors, administrators, trustees, successors and assigns of such persons or concerns as are or were partners or in partnership; the unknown guardians, conservators and trustees of such persons as are minors or are in anywise under legal disability.

4. The Lessee-Producer classes previously established and certified by the Court are the following:

(as described in Civil Action No. KC-1980):

. . . the persons, firms and corporations denominated "lessee-producers," who are the owners of leasehold interests in the oil and gas leases (from which gas is produced for delivery to Panhandle Eastern Pipe Line Company) and who deliver, have delivered or will deliver helium contained in gaseous streams directly or indirectly to Panhandle Eastern Pipe Line Company, which helium has been, is being or will be removed and delivered by plaintiff as Interpleader National Helium Corporation into the

possession of the United States of America at the delivery point described in that certain contract between the United States and National Helium Corporation dated October 13, 1961.

and

(as described in Civil Action No. W-4613)

All persons, firms, corporations, or concerns who are or have been owners of leasehold interest under the oil and gas leases covering the mineral interests in land owned by the members of the Landowner-Lessor Class above described (in the Landowner Class definition in Civil Action No. W-4613) or who are or have been making, or required to make royalty payments to lessors by reason of natural gas production under such leases since the beginning or such removal of helium from such streams, or who are or have been the owners of unleased mineral interests in land from which and while helium has been so severed and removed, and the heirs, executors, administrators, trustees and assigns of such persons; the officers, successors, trustees and assigns of any such concerns as are existing, dissolved or dormant corporations; the executors, administrators, trustees, successors and assigns of such persons or concerns as are or were partners or in partnership; the unknown guardian, conservators and trustees of such persons as are minors or are in anywise under legal disability.

By letters dated August 7 and 9, 1984, Gulf Oil Corporation and Phillips Petroleum Company, respectively, members of the Lessee-Producer classes, ratified and adopted the Helium Settlement Agreement. Copies of the letters were identified and received as PEPL Exhibits Nos. S-1 and S-2.

5. The procedures for giving notice of the settlement agreement and of this hearing to members of the classes

(including suppliers of gas under exchange agreements) in person and by publication prescribed by order of the Court dated October 16, 1984, have been faithfully and properly carried out by the parties responsible therefor. As a result, the Court concludes that adequate notice has been given to all parties to the Helium Settlement Agreement and to members of affected classes.

6. The notices referred to in paragraph number 5 above provide that:

> . . . if any member of such classes wishes to show cause why his or her interests have not been adequately represented by the named representatives of the Classes or to object to the proposed settlement, such cause or objection must be made by the filing of an appropriate pleading on or before the 19th day of February, 1985, with the Clerk of this Court.

The Court finds that no such cause or objection has been filed with the Clerk of this Court.

7. Paragraph numbered (9) of the Helium Settlement Agreement sets out the annual volume of helium extracted by National for each year as pertains to each of the captioned cases according to the best knowledge of the parties. Paragraph numbered (10) provides that subsequent disagreements which cannot be resolved by the parties shall be determined by the Court. The parties have now informed the Court that no such disagreements exist. Therefore, the Court finds that the volumes set out in paragraph numbered (9) are correct and shall be the basis used for the ultimate distribution of the Court Settlement Fund.

8. The Court previously found that both the Lessee-Producers and Landowner classes in Case No. KC-1980 met the requirements of Rule 23(b)(1)(A) and (B) Fed R. Civ. P. The Court further finds that this Court has jurisdiction of the members of the classes described in paragraphs numbered 3 and 4 above and of all other

parties to the captioned cases so that this Order is binding on all such persons and parties.

9. This Court has presided over all trial court proceedings in this litigation since KC-1980 was filed in 1963. The Court has observed counsel in the conduct of the cases and believes that counsel for all parties are competent and experienced and have demonstrated diligence and vigor in their advocacy on behalf of their respective clients. The Court finds that such counsel were authorized by their clients to negotiate the settlement and that they did so free of any improper coercion or collusion. The Court gives much weight to the expression by such counsel that in their opinion the settlement is in the interest of their clients and of the members of the classes.

Case No. KC-1980

10. (a) Previous proceedings in KC-1980 in this Court include a separate trial as to liability and an original trial and further trial upon remand by the Circuit Court of Appeals for the Tenth Circuit as to remaining issues. At the trial on remand from the Circuit Court, held from November 29, 1982, to December 9, 1982, the evidence on behalf of the Lessee-Producers and Landowners would indicate wellhead values ranging up to $13.71 per Mcf of helium while the evidence offered by Panhandle and National would indicate a value of approximately $.04 per Mcf. This Court made extensive findings of fact and conclusions of law in a memorandum entered on October 18, 1983, which the Court now adopts and makes a part hereof by reference. The Court concluded that a fair value of helium at the wellhead for which the Helex companies should compensate the Lessee-Producers and Landowners was $3.82 per Mcf of helium extracted by National at its Liberal, Kansas, plant and sold to the United States. The Helium Settlement Agreement provides that this amount will be reduced to $3.60

per Mcf or a reduction of approximately 5.8% and further provides for payment of interest at the rates fixed by the Court. All issues relating to value and interest were highly contested. The Court is of the opinion that this is a reasonable discount or reduction in order to avoid further delay and the expense and uncertainties involved in the present appeal to the Circuit Court and possibly further trial and appellate proceedings.

(b) The Court is informed that the United States who entered the case as an intervenor has consented to the settlement as required by paragraph numbered (20) of the Helium Settlement Agreement.

(c) Threfore, the Court finds that settlement of Case No. KC-1980, as contained in the Helium Settlement Agreement is reasonable and fair to all parties and class members and should be approved.

Case No. W-4613

11. (a) At the time the Helium Settlement Agreement was entered into, pretrial proceedings in Case No. W-4613 were virtually completed. All discovery had been completed, the parties had submitted proposed pretrial orders and the case was set for trial. On January 5, 1984, this Court entered an order determining that the liability principles of KC-1980 and the other Consolidated Helium cases were equally applicable to cases involving private sales. All helium involved in W-4613 was sold on the private market and was produced in the same facilities as was the helium in Case No. KC-1980. Both categories of helium were produced during the same period of time except, that the time of production in Case No. W-4613 extended beyond the time of production in Case KC-1980 by approximately seven (7) months. Therefore, the cost of extraction of the two categories of helium would be approximately the same. The average sales price of the W-4613 helium was approximately

$14.48 per Mcf while the average sales price of the KC-1980 helium was $12.56 per Mcf. The higher price received for the W-4613 helium tends to be offset by the fact that National incurred some additional costs of sales and of holding in inventory the W-4613 helium. Panhandle and National have introduced evidence that the cost of storage, shrinkage, and carrying charges incurred in selling the W-4613 helium amounts to an average of $2.32 per Mcf. Based upon the Court's findings in KC-1980 and upon the evidence submitted herein by the parties, the Court finds that the value of helium involved in W-4613 is generally comparable to the value of helium involved in KC-1980.

(b) The Court finds that settlement of Case No. W-4613, as contained in the Helium Settlement Agreement is reasonable and fair to all parties and class members and should be approved.

THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED that the Joint Motion for Approval of Helium Settlement Agreement filed in the captioned cases on October 12, 1984, is hereby granted and the Helium Settlement Agreement dated July 17, 1984, a copy of which is attached to such joint motion, is in all things hereby approved. IT IS FURTHER ORDERED, ADJUDGED, and DECREED that after payment to the Clerk by Panhandle and/or National of all funds required to be paid by paragraph numbered (5) of the Helium Settlement Agreement, the Helex companies are fully discharged of any further liability to the members of the Landowner and Lessee-Producer classes as a result of any helium produced at National's Liberal, Kansas, plant prior to the date of this Order and are further discharged of any liability to account to the members of the classes for any sums received by National in the settlement of its breach of contract action against the United States in the United States Court of Claims, Case No. 158-75. The release of liability on the part of the

Helex companies as provided in this paragraph shall not relieve Panhandle of its obligation to assist in distribution of the Helium Settlement Fund as provided in paragraph numbered 17.

Allocation of Helium to Input Points

12. There came on next for consideration the matter of determining the amount of helium which shall be attributed to each input point for the purpose of determining the proportionate part of the Court Settlement Fund which shall be allocated to the persons supplying natural gas at such input points. The expert witness James D. Brown, offered by Panhandle, identified PEPL Exhibit No. S-4, as a computer print-out reflecting, to the best of the ability of Panhandle, the volumes of helium extracted by Natural which had been supplied at each input point. In constructing the exhibit, Panhandle determined for each month during which helium was extracted in National's plant:

(1) The volume of natural gas, including the mol percentage helium component thereof, delivered to Panhandle at each input point on Panhandle's pipeline subsystem;

(2) The percent, calculated on an annual basis, of the natural gas delivered into the Kansas, Texas and Huber-Light subsystems, respectively, which did not become available to National's plant because the gas was sold for agricultural, commercial and other uses, was lost through equipment failures or was otherwise diverted or lost from the subsystem ("Diverted Gas");

(3) The volumes of gas available at National's plant from each of the three pipeline subsystems that were processed and that were bypassed around the plant;

(4) The volumes of natural gas delivered to Panhandle at certain wellhead input points, which volumes, in turn, were isolated from other volumes of Panhandle and were redelivered to Colorado Interstate Gas Company (CIG), who in turn made the volumes available to the Alamo helium extraction plant; and

(5) The volume of helium extracted and sold by National.

Panhandle experts first adjusted pipeline input gas volumes by excluding from the printout such volumes which were isolated from other volumes of Panhandle and were redelivered by Panhandle through Measuring Station 3934 to CIG for the Alamo plant for processing. The experts then adjusted volumes at input points on each of the three pipeline subsystems by reducing volumes by the percent factor of upstream Diverted Gas and adjusted volumes available at National's plant from each of the three subsystems to reflect the portion of the available volumes that were processed in the plant and the portion that was bypassed around the plant. They then determined the volume of helium attributed to each input point and adjusted the volume proportionately so that the aggregate volume of helium from all input points would equal the volume of helium which was extracted by National.

13. Counsel for the Lessee-Producers stated that experts on behalf of the Lessee-Producers had spent approximately 1,000 to 1,500 hours examining and verifying the data reflected in PEPL Exhibit No. S-4 and that they concurred in the results reflected in the exhibit. No objections were offered to the exhibit on behalf of the Landowner classes or by any party.

THEREFORE, IT IS ORDERED, ADJUDGED, and DECREED that PEPL Exhibit No. S-4 is approved and accepted by the Court and that the volumes of helium

reflected on such exhibit as having been supplied at each input point and extracted by National at its Liberal, Kansas, plant is adopted as the basis for distributing the Court Settlement Fund to the Landowners and the Lessee-Producers entitled thereto.

Distribution of the Court Settlement Fund

14. The Court next considered the mechanism to be applied in making distribution of the Court Settlement Fund to the numerous leasehold working interest owners and royalty owners. Panhandle's expert, James D. Brown, identified PEPL Exhibit No. S-6 as a computer printout reflecting, to the best of the ability of Panhandle for the period of time and for all helium that was produced at National's plant, in alphabetical sequence, the name, address and decimal ownership interest of each supplier of natural gas, and each royalty owner to whom Panhandle made payment for natural gas, and the volume of helium allocated to the Supplier's or royalty owner's interest on a month-to-month basis and totaled by year and entire period of production. The ownership reflected on PEPL Exhibit No. S-6 is based upon ownership records maintained by Panhandle in the ordinary course of its business. The basis for the volume of helium allocated to the interest owners at each input point is the allocation of helium reported in PEPL Exhibit S-4.

15. The witness Brown testified that since the initial production, there have been numerous transfers of interests in natural gas, including the helium component, owned by Suppliers and royalty owners as a result of deaths, assignments and other transfers as to which the owners of the interests in such natural gas, including helium, have not supplied information sufficient to make a determination of the interest owner or the period of time during which it held that interest. The Court finds that the most appropriate manner of determining the actual ownership is to tender payment to the record own-

ers (i.e., those owners who are shown to have had an ownership interest in wellhead production as produced during the period from 1963 and through 1973), conditioned upon certification by that recipient of its entitlement to that total distribution. The Court further finds in the event that a recipient does not certify entitlement to the total distribution, that recipient should supply information reasonably available to it that would assist in the determination of the identity of those interest owners entitled by the distribution. In cases of death, assignment or other transfer of the right to receive payment, the successor interest owner, in order to receive payment, shall submit proof of succession in ownership.

16. The Court determined that the following procedures will fairly, adequately and reasonably protect each working interest and royalty owner in receiving his proportionate share of the Court Settlement Fund, and accordingly the Court directs that such procedures be carried out.

(a) Within 10 days from the date of this Order, Panhandle shall deliver or mail to each First-tier Supplier a copy of that portion of PEPL Exhibit No. S-6 pertaining to the First-tier Supplier's interest. In addition, Panhandle shall file with the Clerk a certification that it has made the delivery or mailing to the First-tier Supplier of the respective portions of PEPL Exhibit No. S-6 in compliance with this Order.

(b) Within 60 days from the date of this Order, each First-tier Supplier to whom Panhandle shall have delivered or mailed its report shall deliver or mail to each of its Second-tier Suppliers, a report showing on a month-to-month basis, according to the Supplier's records kept in the ordinary course of its business, the decimal ownership interests of the Second-tier Supplier, and the volume of helium allocated to the Second-tier Supplier attributable to each input point. In addition, the First-tier Supplier shall file with the Clerk, (i) a copy of the

reports delivered or mailed to the Second-tier Suppliers and (ii) a report showing as to volumes of allocated helium at each input point attributable to royalty owners the name, address and decimal ownership interest, and amount of helium allocated to each royalty owner to whom the First-tier Supplier made payments.

(c) Within 90 days of the date of this Order, each Second-tier Supplier to whom the First-tier Supplier shall have delivered or mailed its report shall file with the Clerk and mail to the First-tier Supplier a report showing as to the volumes of allocated helium at each point reported by the First-tier Supplier (i) the decimal ownership interest of the Second-tier Supplier, (ii) the name, address and decimal percentage ownership of each supplier to it and (iii) the name, address and decimal ownership interest of each royalty owner to whom the supplier made payments.

(d) Suppliers to Second-tier Suppliers, and any others in the chain of title of Suppliers from the wellhead to National's plant shall, in like manner, file with the Clerk reports required to asure distribution of the Helium Settlement Fund to the persons entitled thereto. When Panhandle, First-tier Suppliers, Second-tier Suppliers or any other Suppliers mail or deliver reports described in subparagraphs (a), (b) and (c) above, such report shall be accompanied by the following: (i) a copy of this Order, and (ii) a copy of the Helium Settlement Agreement.

(e) For good cause shown, the Court may extend the time to make the reports and filing required by this Order or otherwise modify the procedure for distribution for any specific Lessee-Producer. However no portion of the Court Settlement Fund shall be distributed to a Supplier who has not filed the report required by this Order, certified and warranted entitlement to the amount claimed and certtified and demonstrated that it will deliver or mail distribution of the share thereof to the other

entitled Suppliers and Landowners within 10 days of receipt of the distribution.

17. After time for appeal from this final judgment has expired without such an appeal having been made, or as provided in paragraph 21, *infra*, and after payment of expenses and attorney fees as allowed in paragraphs 19 and 20 hereof, the Clerk or such other entity as shall be designated by the Court, shall distribute the Court Settlement Fund in the proportion that helium is allocated to each input point in PEPL Exhibit No. S-4 to those persons who have heretofore been responsible for making payment of leasehold working interests and royalties for natural gas delivered to each input point. The distribution to each such person shall be calculated in the same manner as the calculation of the liability of National and Panhandle for principal and interest under paragraph numbered (7) of the Helium Settlement Agreement reduced proportionately by the amount of expenses and attorney fees allowed by the Court. The persons receiving such funds shall promptly distribute the funds as agents of the Court to leasehold working interest owners and royalty owners entitled thereto. Each Lessee-Producer is authorized at its option to withhold from distribution any amounts for which is may be liable for severance or production taxes to any state taxing authority until its liability for such tax is determined. In the event any Lessee-Producer does so withhold, then it must proceed with diligence to seek a final determination of such liability. Although the parties are of the opinion that no such liability exists, this provision is included merely as a precaution.

18. The Court retains jurisdiction over each person to whom a distribution is made and over all funds distibuted until received by the ultimate beneficiary. Each Supplier shall file with the Clerk within sixty (60) days of such distribution or tender thereof a report showing that it has made or tendered distribution in compliance

with this Order. Money distributed into pre-existing suspense accounts need not be returned to the Clerk at the end of the 60-day period as long as the Supplier certifies to the Clerk that it is diligently attempting to determine the new ownership, or otherwise abate the reason distribution is suspended, or, unless on showing of good cause, the Court orders the return of the share to the Clerk. Following this, each Supplier who is unable to effectuate complete distribution to one or more persons entitled thereto shall return to the Clerk of this Court by July 1, 1986, all funds which were not effectively distributed by that time. Such Supplier shall accompany the return of such funds with a final report specifying the reason why funds owing to each person having a royalty or other interest have not been effectively paid and distributed to such person. The Clerk will retain all such funds, and other unclaimed or unpaid funds, in an interest-bearing escrow account, to abide the further order of this Court.

Attorney Fees and Expenses

There came on next for consideration the applications of counsel for the Landowners and Lessee-Producers and representatives of the classes for allowance of attorneys' fees and expenses to be paid from the Court Settlement Fund.

19. The Court has conducted the complex and protracted Consolidated Helium Litigation for the past twenty-two years since the cases were instituted in this District. KC-1980 was one of such consolidated cases, which commenced in 1963. W-4613 was commenced in 1971 in state court and was removed to this Court that same year. Based upon the Court's knowledge of the intensely litigated issues in these cases and of the filings and proceedings herein, upon the testimony and evidence adduced at this hearing, and upon the court's knowledge of the role played by various counsel, the Court makes the following findings:

(a) The legal services performed and the expenses incurred in the severed portion of W-4613 and in KC-1980 cannot be segregated from the services rendered in the remaining consolidated cases and the nonsevered portion of W-4613. Based upon volumes of extracted helium subject to this settlement as compared to total volumes of helium involved in the consolidated cases, and based upon the relative value of the helium as fixed by the Court in KC-1980 as compared to the helium extracted by Cities Service and Northern in the other cases, the Court finds it reasonable to allocate 45% of the legal services and expenses of the Lessee-Producers involved in the consolidated cases to the present settlement of KC-1980 and W-4613. Since the Helium Settlement Agreement provides that Panhandle will not pay its affiliated companies in the Lessee-Producer classes, but that those affiliated companies will pay their Landowner-Lessors, the Court finds it reasonable to allocate 51.52% of the expenses of the Landowner class involved in the consolidated cases, to the present settlement of KC-1980. The Court further finds it reasonable to allocate 11.78% of the expenses of the Landowner-Lessors to the present settlement of W-4613 covering helium extracted by National and sold in the private market. Fees and expenses of Landowners' counsel shall be paid out of the royalty share of the Court Settlement Fund. Fees and expenses of Lessee-Producers shall be paid out of the working interest share of the Court Settlement Fund.

(b) Counsel for the Landowner class representatives, and for the Landowner class, are awarded reasonable attorneys' fees and out-of-pocket expenses as follows:

Dale M. Stucky of the firm of Fleeson, Gooing, Coulson & Kitch, Wichita, Kansas, has been principal counsel for the Landowner class. He has been assisted by other members of his firm; by the firm of Kramer, Nordling, Nordling & Tate, Hugoton, Kansas, and by counsel from Oklahoma. The legal services of such counsel have been

of great benefit in securing the recovery on behalf of the Landowner-Lessor class herein. Reasonable attorneys' fees for all work performed by these counsel are hereby awarded in the amount of one-third (⅓) of the share of the Court Settlement Fund allocable to members of Landowner-Lessor classes, after deducting from such share the reasonable litigation expenses chargeable against members of Landowner-Lessor classes, when the amount of the Court Settlement Fund is finally established at the time of distribution pursuant to the order of this Court. Out-of-pocket expenses are awarded in the amount of $187,450.56.

(c) Panhandle has incurred $33,877.10 in publication expenses, two-thirds of which under the terms of the Helium Settlement Agreement are to be reimbursed from the Lessee-Producers' share of the Court Settlement Fund. The Court hereby awards Panhandle $22,584.71 from the share of the Court Settlement Fund awarded to the Lessee-Producers.

20. The Court heard evidence on the issue of attorneys' fees and expenses to be allowed to counsel for the Lessee-Producer class on March 5, 6, and 7 of 1985. On March 7, 1985, Phillips Petroleum Company and others sought an adjournment and continuance of the hearings for the purpose of retaining and presenting an expert witness on the issue of attorneys' fees. The Court found that while all parties had full and complete notice of the hearing on this issue several months prior to the hearing date of March 5, the hearing would be adjourned until a further hearing date at 1:30 p.m. on March 25, 1985; and that a prehearing conference would be held at 1:30 on March 18, 1985. Thereupon, on the —— day of March, 1985, the Court, having heard the evidence and arguments presented by the parties, makes the following findings and orders:

(a) The Court finds that the following Lessee-Producer class representatives, through their counsel,

have adequately and diligently represented the Lessee-Producer class, and that these class representatives have advanced certain litigation expenses and fees which have assisted in the prosecution of the Lessee-Producer claims and in the creation of the Lessee-Producer portion of the Settlement Fund; and that each of such parties should be reimbursed from the Court Settlement Fund for the following sums representing such advancements:

Amoco Production Company	$171,219.14
Ashland Oil, Inc.	422,952.18
Atlantic Richfield Company	73,909.42
Dorchester Gas Producing Company (Now Damson Oil Co.)	14,772.02
Cabot Petroleum Corporation	84,384.84
Helmerich & Payne, Inc.	34,796.98
Texaco Inc.	67,390.94
Gulf Oil Corporation	50,384.92
Mobil Oil Corporation	155,733.15
Mapco Production Company	40,880.30
Superior Oil Company	15,931.29
Diamond Shamrock Corp.	24,573.45
TOTAL	$1,156,928.50

(b) The Lessee-Producer class representatives have incurred and will incur other miscellaneous expenses estimated to total $125,000.00 which should also be paid from the Lessee-Producer share of the Court Settlement Fund, to the law firm of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kansas, as agent for such Lessee-Producers, under the supervision of the Court. Such law firm shall pay necessary bills and file an accounuting with the Court within 30 days after final pay-out of the Fund. The total amounts specified in this subparagraph 20(b) and in subparagraph 20(a) above amount to approximately 1.7% of the Court Settlement Fund. These amounts shall be deducted in that percentage figure (1.7%) from the funds prior to being disbursed to the Lessee-Producer class members, or at such percentage figure as may be calculated at the time of payout.

(c) Based upon the verified applications for attorneys' fees filed by counsel for the Lessee-Producer class representatives prior to March 5, 1985; upon the evidence adduced at the hearings hereon; upon the findings and for the reasons stated by the Court at there hearings, the Court rules that the counsel for such Lessee-Producer class representatives shall be paid ———— percent of the Lessee-Producer portion of the Court Settlement Fund above. The Court specifically finds from the evidence that the amount represented by this percentage is reasonable and is required to adequately compensate such counsel for the legal services performed in this litigation for the fllowing reasons: The extraordinary complexity and protracted nature of this helium litigation since July, 1963; the amount of time spent by each of counsel as reflected in the evidence, which evidence is accepted by the Court; the high quality of the services performed; the novelty of the issues; the number of adverse parties and the quality of opposing counsel; the vast number of hotly contested issues at all stages of this litigation; the number of trials, hearings, appeals and other proceedings conducted by counsel; the vast number of documents, exhibits, records and other materials required to be reviewed, analyzed; the vast amounts of legal research required on many novel substantive and procedurel issues; the nature of the arrangements by such counsel for payment from clients of only minimal or subsistence fees pending the conclusion of the cases and the highly contingent right of recovery from the interpleader fund in view of the debatable legal issues relating to liability and valuation; the skill and tenacity of counsel in conducting settlement negotiations and in refusing to accept very substantial and appealing, but inadequate, settlement offers at an earlier time; the enormously beneficial result conferred thereby upon the members of the Class. Such legal services were performed without unnecessary duplication and in an efficient manner. While the amount above allowed as fees is fully supported by the alter-

native lodestar methodology presented in the applications for fees, the Court finds that this is a common fund case, not a statutory fee case, and that the amount represented by the above percentage award is legally and equitably appropriate under all the facts and circumstances of this case. These Lessee-Producer counsel have agreed to the following allocation among themselves of the foregoing fee award, which agreed allocation the Court approves for purposes of payment from the Lessee-Producer portion of the Court Settlement Fund:

Foulston, Siefkin, Powers & Eberhardt	60%
Gott, Young & Bogle	11%
Hershberger, Patterson, Jones & Roth	25%
James B. Diggs	4%
	100%

(d) The percentage portion of expenses and fees awarded to Lessee-Producer class representatives and to their counsel in subparagraphs 20(a), 20(b), and 20(c) shall be deducted and paid from the funds to be disbursed to an for the account of the Lessee-Producer class members; and the remaining balance shall be paid to the Lessee-Producer class members as hereinabove provided.

21. The Court hereby severs from the Court Settlement Fund to be paid out as above provided that portion of the Fund to which any Lessee-Producer member of the class is entitled by reason of its share of helium attributable to its working interest ownership and as to which such Lessee-Producer objects to the assessment of the attorneys' fees or expenses hereinabove settled by the Court, and further the Court severs the issues relating to such severed portions of the Court Settlement Fund from all other issues in this case. As to such severed portion of the Fund, no funds attributable to the interest owned by such Lessee-Producer shall be paid out. Rather, such severed funds shall be retained by the Clerk of this Court for investment in U.S. Treasury Bills for a period

not to exceed one (1) year, subject to further order of the Court; provided, that if an objecting Lessee-Producer fails to timely appeal the order of this Court, the severed funds of such party shall be paid out along with the remainder of the Court Settlement Fund. The Court specifically orders that the Court Settlement Fund, except for the severed portion, shall be paid out to those parties not objecting and appealing from the Court's order, in accordance with the time schedule herein contained. Those parties objecting and appealing the order for attorneys' fees and expenses shall comply with all procedural requirements for consummation of all payments and shall pay the royalty interests as herein required, notwithstanding their objections to the attorneys' fees and expenses as awarded herein.

DATED AND ENTERED at Wichita, Kansas, this —— day of ————, 1985.

WESLEY E. BROWN
Senior Judge
United States District Court

APPENDIX D

RULE 28.1 LIST

PHILLIPS PETROLEUM COMPANY'S DIRECT AND INDIRECT SUBSIDIARIES AND AFFILIATES OWNED LESS THAN 100%*

Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Biosciences Corporation of Texas (BIOTX)
Bissendorf Biosciences GmbH
Canada Western Cordage Company, Limited
Canyon Reef Carriers, Inc.
Chisholm Pipeline Company
Cochin Refineries Limited
Colonial Pipeline Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Great Yarmouth Port Labour Company Limited
Heat Transfer Research, Inc.
Incinatrol Inc.
Insurance and Reinsurance Brokers (Burmuda) Limited
Iranian Marine International Oil Company—Iminoco
Kenai LNG Corporation
Long Beach Oil Development Company
Multinational Gas and Petrochemical Company
Multinational Gas and Petrochemical Services Limited
Norland GmbH fur Grundbesitz und Industrieanlagen
Norpipe, A.S.
Norpipe Petroleum UK Limited
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Limited

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* Does not include companies required to issue one or more shares to directors or officers.

Oil Insurance Limited
Papago Chemicals, Inc.
Phillips Carbon Black Limited
Phillips Petroleas Chile, S.A.
Phillips Petroleum Chemicals
Phillips Petroleum International Andina, S.A.
Phillips Petroleum International Finance N.V.
Phillips Petroleum Singapore Chemicals (Private) Limited
Phillips Petroleum Tanker Management, Limited
Phillips Petroleum Toray Inc.
Phillips-Imperial Petroleum Limited
Polar LNG Shipping Corporation
Porteina Brasileira Ltda.
Renolit-Haus GmbH
Solar Gas, Inc.
SPODCO Limited
SPODCO-USA, Inc.
The Salk Institute Biotechnology/Industrial Associates, Inc.
Venezoil, C.A.
Wadley Biosciences Corporation
Western Desert Operating Petroleum Company (WEPCO)

AMOCO PRODUCTION COMPANY

The following companies represent Amoco Production Company's affiliates pursuant to Rule 28.1:

Amoco Corporation
Amoco Company
Amoco Credit Corporation
Analog Devices, Inc.
Cetus Corporation

CITIES SERVICE OIL AND GAS CORPORATION

Cities Service Oil and Gas Corporation is a wholly-owned subsidiary of Cities Service Company, which is, in turn, a wholly-owned subsidiary of Occidental Petroleum Corporation. Its non-wholly-owned affiliates are:

Canadian Occidental of California, Inc.
IBP, Inc.
Cain Chemical Inc.

Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1959

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY, AMOCO PRODUCTION COMPANY and CITIES SERVICE OIL AND GAS CORPORATION, *Petitioners,*

vs.

OLIVER S. BROWN, et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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For Foulston, Siefkin, Powers & Eberhardt, Lead Counsel for Lessee Producer Class and Counsel for Class Representatives Ashland Oil, Inc., Atlantic Richfield Company, Cabot Petroleum Corporation, Damson Oil Corporation, Helmerich & Payne, Inc. and Texaco Inc.

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*Counsel of Record

June 14, 1988

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

In this class action in the nature of interpleader involving claims to the proceeds of helium extracted from natural gas, counsel for the defendant Lessee Producer class recovered a common fund for the benefit of the class after engaging in twenty-five years of litigation in several state and federal district courts. At least six groups of appeals were taken to the Tenth Circuit, as to which there were ten denials of petitions for certiorari by this Court. They were opposed by six teams of lawyers representing different sets of interested parties. The total Record was the largest ever amassed in that Circuit. A $75 million fund for the benefit of the Lessee Producer class resulted from a 1985 settlement by a major helium extractor, representing almost half of the helium subject to the litigation.

The question presented is whether the trial court abused its discretion in finding that a reasonable amount equal to 16.5% of the fund should be used for paying all litigation expenses and attorneys' fees to the class representatives and class counsel for the twenty-five year period, such finding being made only after the court (which handled the litigation from its inception) conducted a five day evidentiary hearing on the expense and fee issues and after the court made findings concerning, and weighed, twelve specific factors, including time and contingency, bearing on the issue of reasonableness.

LIST OF PARTIES

Respondents' statement pursuant to Rule 28.1 is re-rinted in the Appendix, infra.

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No. 87-1959

In the Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIPS PETROLEUM COMPANY, AMOCO PRODUCTION COMPANY and CITIES SERVICE OIL AND GAS CORPORATION, *Petitioners*,

vs.

OLIVER S. BROWN, et al., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners fail to state the factual record "with accuracy" as required by Rule 21.5. Their petition omits and misstates material facts in the record. They ignore key facts which the trial court, and the appellate court, considered and concluded. The result is a hypothetical case which bears no relationship to what happened below, manufactured by petitioners to rationalize their groundless conclusion that the trial court used an "arbitrary percentage" to fix attorney fees that "far exceed the market value of the services performed". The Petition should be denied for this reason alone.

This action in the nature of interpleader, seeking to determine rights and liabilities concerning helium extracted from natural gas, was commenced in 1963 by National Helium Corporation, a major helium extractor, and an affiliate company, Panhandle Eastern Pipe Line Company. The helium was supplied by Lessee Producers owning the gas wells producing helium-bearing natural gas, from lands owned by Landowners who had given leases authorizing production. The Lessee Producer parties and Landowner parties were made representatives of certified classes under Rule 23, FRCP. The action was consolidated in the district court with similar actions brought by other helium extractors. Interrelated actions in other federal and state courts proceeded simultaneously, some being consolidated for appellate review.

For nearly twenty-five years counsel for the ultimately prevailing Lessee Producer class were opposing six teams of other counsel representing four helium-extracting companies (including Cities Service Helex, Inc., an affiliate of petitioner Cities Service Oil and Gas Corporation, and Phillips Petroleum Company, also a petitioner here), Landowners and the Government.

At least six massive appeals to the Tenth Circuit resulted from a series of complex trials in two federal district courts. Engaging in massive discovery and intense litigation over innumerable substantive and legal issues, the siege became an unending war. *Grounds v. Northern Natural Gas Company*, 327 F.2d 1003 (10th Cir. 1964); *Northern Natural Gas Company v. Grounds*, 441 F.2d 704 (10th Cir. 1971), *cert. denied*, 404 U.S. 951, 1063; *Ashland Oil, Inc. v. Phillips Petroleum Company*, 554 F.2d 381 (10th Cir. 1977 *en banc*), *cert. denied*, 434 U.S. 921, 968; *Ashland Oil, Inc. v. Phillips Petroleum Company*, 607 F.2d 335

(10th Cir. 1979), *cert. denied*, 446 U.S. 936; *Northern Natural Gas Company v. Grounds*, 666 F.2d 1279 (10th Cir. 1981), *cert. denied*, 457 U.S. 1126; and several long published and unpublished district court decisions in Kansas and Oklahoma, were but the small tips of icebergs representing the most visible evidence of the issues shaped, fought and resolved in the litigation. Ten unsuccessful petitions for certiorari were filed with this Court by Lessee Producer opponents between 1971 and 1982.

Lead counsel for the Lessee Producer class for the entire 25 year period represented several gas producer parties which were representatives of the class, but which had only a small stake in the outcome, compared to other parties and class members. Due to the inordinate amount of time required to litigate, lead counsel had agreed to bill their clients for minimal amounts from time to time, which would reimburse the law firm for office overhead. A reasonable fee was contingent on, and recoverable only, from a recovery on behalf of the class. All Lessee Producer parties were so advised. In 1974, after liability had been established, a formal filing of this fee arrangement was made with the district court and served upon all parties. (R.Vol. 5, LP Ex. G). No objection by any Lessee Producer, including petitioners, was made to that arrangement. Joint briefs filed on behalf of Lessee Producer class representatives in the trial and appellate courts recognized that reasonable attorneys' fees would be paid from funds, if any, recovered on behalf of the class. The trial court accepted this undisputed and documented contingent fee arrangement. (A. 6a-7a).

Each of the class counsel law firms assumed significant economic risk by making available experienced litigators for many years in protracted litigation wherein risk of

nonrecovery was great. Petitioners' assertion that counsel were paid for all their time at regular hourly rates up to $200 per hour is contrary to the undisputed evidence of record, and the findings below. [In 1984, lead counsel had billed at $200 per hour for some time, but billed nothing for hundreds of hours spent thereafter].

As provided in the 1984 settlement agreement between Lessee Producers, Landowners and National Helium Corporation (and its affiliate, Panhandle Eastern Pipe Line Co.), counsel for the Lessee Producer class in early 1985 filed detailed, verified applications for reasonable attorneys' fees and for reimbursement to class representatives of litigation expense advancements, with interest on those advancements.

Evidentary hearings on these applications were held on March 5, 6, 7, 25 and 26, 1985. During that entire period, petitioners had complete access to all case files of class counsel, including litigation expense advancements and available contemporaneous time records along with all billings made by counsel to their clients for the entire litigation period. Regular contemporary time records were generally available for the period following 1979. For the earlier period, billing statements and other documents provided an objective basis for conservative reconstruction of time, which was presented in the hearings in the form of testimony and exhibits. Forty-five percent of the consolidated helium litigation work was allocated to the settlement with National Helium Corporation. The time of the three law firms and an individual practitioner, acting as class counsel, so allocated to the settlement, amounted to 20,798 lawyer hours, including time required after the hearings to consummate distribution of the set-

tlement funds to many thousands of producers and landowners.[1]

At the March, 1985, hearings, only the three petitioners, out of 470 class members, opposed counsel's litigation expense and fee applications. [Another class representative, Mobil Oil Corporation, filed a recommendation that the total award should be 15% of the Fund, rather than the 16.5% awarded]. One of these was Phillips Petroleum Company which is a Helex company as well as a Lessee Producer and has always opposed any recovery whatever by the Lessee Producers. Petitioner Cities Service Oil & Gas Corporation, while joining the Lessee Producer request for a recovery, allowed class counsel to do all the work because it is a sister subsidiary of another Helex company that has always opposed any recovery in a related case. The third petitioner, Amoco Production Company has by its own admission taken only a secondary role in the recovery even though it will be the biggest beneficiary if the judgment in a companion case is sustained in a now pending appeal. All of the other 467 members of the Lessee Producer class have accepted and paid their shares of the expense and fee award without protest. Among them are the most active, experienced, and informed oil and gas operators in the industry, e.g., Exxon Corporation, the nation's largest energy company. Their acceptance of the award attests its reasonableness by industry standards and belies such remarks as the petitioners' statement that: ". . . the Tenth

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1. Foulston Siefkin Powers & Eberhardt (lead counsel), 10,842 hours; Hershberger Patterson Jones & Roth (co-lead counsel 1964 to 1981), 4,758 hours; Gott Young & Bogle, 3,322 hours; James B. Diggs, 1,876 hours (not including another 3,320 hours spent prior to 1975 as regional counsel for Gulf Oil Corporation).

Circuit refused to protect class members against excessive fees". (Pet. p. 6).

Also attesting to the reasonableness of the 16.5% award is the established practice in Kansas of awarding percentage fees, normally 33 1/3%, to prevailing counsel for royalty owners in oil and gas litigation. In this case such an award was made with unanimous support of royalty owner representative parties, even though they did not prevail against the Lessee Producers. In *Gigot v. Cities Service Oil Company*, 241 Kan. 304, 737 P.2d 18 (1987), the Kansas Supreme Court affirmed an 18% award to Lessee Producer counsel in a helium case like this. Thus in the state where the district court sits, a reasonable percentage fee award is an established practice in oil and gas litigation, and is accepted by the industry, the bench, the bar and the public. Such awards do not subject the courts and the profession to public criticism and the petition does not even suggest that the award in this case did so. It was thus a wise exercise of the trial court's discretion and the many allusions in the petition to percentage fee awards "reflect[ing] adversely upon the integrity of the bar, the judiciary, and the class action device" (Pet. p. 12) have no relevance to the case now before this Court.

Nor do the petition's reference to percentage awards "encourag[ing] races to Bhopal" (Pet. p. 16) have any such relevance. In this case the award was made to defendants' attorneys not to plaintiffs' attorneys. They were called upon to defend their clients and the class against two adverse claims, one by the Landowners on the lease coverage of helium, and the second by the helium companies on the coverage of helium by FPC service rates and FPC gas rate schedules. Both were questions of first

impression. Had Lessee Producers failed against the Landowners, their clients and the class would have been subjected to heavy liability to the Helex companies on their warranties of title. No such circumstances existed in any of the cases on which petitioners rely.

The litigation expense and fee applications contained detailed analyses of the various factors bearing on reasonableness. They included lodestar calculations consistent with those made by other courts. The total sought amounted to 19% of the settlement fund. The applications were supported by Lessee Producer class representative clients of lead counsel, through their staff counsel who were familiar with the litigation.

After the hearings, transcripts of testimony were supplied, in addition to the exhibits. All parties filed detailed requested findings and conclusions. Those of the Lessee Producers included lodestar calculations supporting an award which would be in the range of 16.5% of the fund.

The district court entered its order allowing expenses and fees on May 15, 1985, finding and concluding that an amount equal to 16.5% of the fund was reasonable and fair compensation for all expenses and fees, and that the lodestar formula commonly used in statutory fee-shifting cases was not "equitably appropriate" under the facts of this litigation (A. 17a-18a):

> . . . The lodestar formula commonly used in determining the applications for attorney fees in cases when such an award is authorized by a specific statutory provision is not, in our opinion, legally applicable to this "common fund case" and equitably appropriate under all of the facts and circumstances of

this litigation, see *Blum v. Stenson,* ..... U.S. ....., 104 S.Ct. 1541, 1549 note 16 (1984). We believe that the award of attorneys' fees less expenses on a percentage basis from a fund recovered for the benefit of the class in this case is not inappropriate, see *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478-491, 62 L.Ed.2d 676, 681-682 (1980). We point out that if we had attempted to adopt the lodestar formula, the lessee-producers' attorneys would have met with ease all of the applicable lodestar standards for the determination of a reasonable and fair fee for the services rendered to the class. . . .

"In the early phase of this litigation, counsel and their clients found no necessity to maintain detailed records for services rendered . . . We have examined the reconstructed records carefully. With this Court's intimate involvements and observations from presiding in this litigation since its filing in 1963, we find the expended hours claimed in the verified fee applications and the attached affidavits to be reasonably acceptable as one part of a lodestar formula determination. See *Ramos v. Lamm,* 713 F.2d 546, 554 note 1 (10th Cir. 1984)."

The district court proceeded to weigh the specific factors relevant to reasonableness in supporting the finding that "the amount represented by this percentage is reasonable and is required to adequately compensate such counsel". (A. 6a-7a). The record included economic testimony adjusting current dollars by past inflation and loss of interest, to arrive at actual dollars per hour as of the time the services were performed. The maximum so calculated for lead counsel as allowed by the district court averaged $90 per hour, while the average for other class

counsel was considerably less. (R.Vol. 5, LP Ex. H; R.Vol. 8, pp. 176-178).

In reimbursing class representatives for their expense advancements over the years (taken out of the 16.5%, leaving a net fee award equal to approximately 14%), the district court allowed them interest from the date of their advancements, which happened to equal the principal. (A. 15a). The interest allowance was not an arbitrary doubling of the amounts they were entitled to, as petitioners suggest. The entire expense and fee allowance was less than the postjudgment interest earned by the fund from the date of final judgment, November 8, 1983, to the date of the 1985 payout.

The Tenth Circuit opinion noted the long and convoluted history of this case (A. 3a):

> An award of attorneys' fees is a matter uniquely within the discretion of the trial judge who "has intimate knowledge of the efforts expended and the value of the services rendered." *United States v. Anglin & Stevenson*, 145 F.2d 622, 630 (10th Cir. 1944), *cert. denied*, 324 U.S. 844, 65 S.Ct. 678, 89 L.Ed. 1405 (1945). We view the award here in the context of approximately twenty-five years of litigation including several state and federal district court cases, at least six appeals to this circuit, massive discovery and evidentiary development, and several thousand docket entries. The total record of related cases in this matter is among the largest ever amassed in this circuit. Perhaps most significantly for the questions before us, the district court judge who determined the attorneys' fee award was involved in substantially all of this litigation. His experience with

> and knowledge about the course of the litigation compels appellate court deference to his determination in the absence of an abuse of discretion. *Lucero v. City of Trinidad*, 815 F.2d 1384, 1386 (10th Cir. 1987).

The court ruled that the lodestar method utilized in its statutory fee awards need not, as a matter of law, be utilized in this common fund case, as long as specific factors relevant to reasonableness are considered and articulated. The court of appeals did not, as petitioners suggest (p. 10) require a percentage award, but rather held that in the circumstances of this case such an award was not, per se, an abuse of discretion. The lodestar method is still available in common fund cases where appropriate. (A. 3a).

The appellate court reviewed the trial record, finding that the trial court had carefully weighed and applied all factors relevant to reasonableness, specifically noting:

> "There is ample evidence in the record to support each of the reasons relied upon by the trial judge. The court here clearly considered all of the relevant Johnson factors and applied them appropriately. The trial judge considered the time and work involved. The record contains documentation supporting the time claims. . ." (A. 7a).

After reviewing the trial court's analysis of the relevant factors governing reasonableness, the appellate court concluded that "in a common fund case, the time and labor involved factor need not be evaluated using the lodestar formulation when, in the judgment of the trial court, a reasonable fee is derived by giving greater weight to other factors, the basis of which is clearly reflected in the record." (A. 9a).

ARGUMENT

IN THIS COMMON FUND CASE, THE TRIAL COURT WHICH WEIGHED TIME AND OTHER FACTORS WAS NOT REQUIRED TO MAKE A LODESTAR CALCULATION IN ALLOWING ATTORNEYS' FEES.

This case is *sui generis*. Most of the litigation occurred decades before the lodestar formula became generally applicable in statutory fee-shifting cases. This case, unlike any other "common fund" fee case, was litigated over a twenty-five year period notable for its rampant inflation. And unlike most class actions, the Lessee Producer class members in this case are largely oil and gas companies which have staff counsel overseeing their interests. Staff counsel for a number of Lessee Producers actively supported or testified at the hearing in support of lead counsel's fee application.

This case is neither a statutory fee-shifting case nor is it a "quasi-common fund" resulting from settlement of statutory fee claims along with the merits. Statutory fee cases involve different policies applicable to awards under fee-shifting statutes. It is, rather, a traditional "common fund" case, in which both state and federal courts may properly award reasonable fees expressed as a percentage of the recovery, as long as factors bearing on reasonableness are weighed and considered. *Blum v. Stenson*, 465 U.S. 886, 900 note 16 (1984); *Commonwealth of Puerto Rico v. Heckleer*, 745 F.2d 709 (D.C. Cir. 1984); Hornstein, Counsel Fee Awards, 69 Harv. L.Rev. 658; Newberg on Class Actions, Sec. 14.03 (2d Ed. 1985); Newberg, Attorney Fee Awards (McGraw Hill, Inc. 1986) §§2.06, et seq. Cf., *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980). The

lodestar formula is but one of several tools used by courts in arriving at a reasonable fee, which is the object in all such cases. *In re Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green*, 778 F.2d 890, 895 (1st Cir. 1985).

Although the trial court found it unnecessary to express a lodestar calculation in its written order, the requested findings submitted to the court contained standard lodestar calculations (using a multiplier of 3 times hourly rates times hours) demonstrating the reasonableness of the amount, equal to 16.5% of the fund, ultimately found reasonable by the court. Accordingly, the district court did find that application of a lodestar formula would easily confirm "the determination of a reasonable and fair fee for the services rendered to the class." (A. 18a).

Petitioners' citation of such cases as *Brewer v. Southern Union Co.*, 607 F.Supp. 1511 (D. Colo. 1984), does not establish the asserted "conflict" or "confusion" in decisions. Indeed, that case summarizes comparable decisions, and finds that reasonable awards comparable to that by the district court in our case are supported by either lodestar or percentage determinations as long as relevant factors are considered and applied. In that five year old case, Chief Judge Finesilver awarded an amount equal to 14% of a $75 million settlement fund by utilizing lodestar calculations. The 14% allowance was also well in line with comparable percentages found reasonable in comparable cases. (607 F.Supp. at 1533). The lodestar calculation for lead class counsel used a multiplier of 3.35 times his $200 per hour rate, times hours, well within the range of multipliers used in comparable cases. (607 F.Supp. at 1533, 1535). This was a "quasi-common fund" settlement of an antitrust suit which also sought statutory attorneys' fees. The case was only five years old, not twenty-

five years old as ours. Interim fees had been paid during its pendency, in amount greater than those paid Lessee Producer class counsel here. Even without adjusting for the loss of inflation and interest during twenty additional years' delay in the instant case, the fee award in *Brewer* is closely in line with the allowance by the trial judge in the instant case—a judge known throughout the circuit for his conservative fee awards. Considering the numerous trial and appellate proceedings in the present case, as compared with settlement after one trial in *Brewer*, and comparing attorney time spent in these two sets of complex cases (20,798 hours vs. 22,190 hours in *Brewer*) on its face supports the trial court's finding that Lessee Producer class counsel performed the legal services "without unnecessary duplication and in an efficient manner." (A. 7a). It should go without saying that a district court is not required, per se, to utilize a lodestar calculation in this traditional common fund case where fee arrangements were made and most of the work was performed before the present lodestar concept, now used for allowances under fee-shifting statutes, was even formulated.

Against the solid record of evidence supporting the expense and fee allowance, and the lower courts' analyses of that record, petitioners' florid misstatement of facts becomes irrelevant. Petitioners' attempt to resurrect the old evils of "arbitrary percentage" awards which exceed "market value" is concretely disproved by the record and the findings below.

The so-called "conflict" between the Tenth Circuit and other courts simply does not exist. The cases from the other circuits on which petitioners rely were decided ten years before *Blum v. Stenson*, 465 U.S. 886 (1984). The instant case was the only common fund case in which

a circuit court has relied on the *Blum* distinction between statutory fee cases and common fund cases. There will be no conflict in circuits unless and until some other circuit refuses to follow the distinction which this Court makes. The Tenth Circuit, in fee-shifting statute cases, carries out this Court's rulings applying lodestar methodology. E.g., *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Blum v. Stenson*, 465 U.S. 886 (1984); *Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983). Yet in common fund cases, courts often recognize the substantial different policies of fee allowances from traditional common funds, as we have noted. See also, Court Awarded Attorney Fees, 108 F.R.D. 237, 250 (Report of the Third Circuit Task Force, October 8, 1985). Nine substantial criticisms of the lodestar approach [which approach had been initiated by the Third Circuit in its "Lindy" cases in the 1970's] led the Task Force to the conclusion that a percentage allowance in common fund cases is more appropriate than lodestar. (108 F.R.D. at 246, 254). The Task Force also noted this Court's recognition that reasonable fees in common fund cases could be allowed based on a percentage of the fund bestowed on the class (unlike allowances under fee-shifting statutes). 108 F.R.D. at 251, citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16. The Task Force recommended, however, that percentage fee allowances be established early in the case, rather than at the end of the case. (108 F.R.D. at 255).

Recent texts analyzing fee decisions also recognize the inappropriateness of a strict lodestar approach in common fund cases. Rather, a reasonable percentage of the fund, after consideration of specified guidelines and particular circumstances of the case, is generally preferred. Once these guidelines and circumstances are considered, the trial judge will not be reversed unless his

discretion is "abused". E.g., Newberg, Attorney Fee Awards (McGraw-Hill, Inc. 1986), §2.07, p. 43.

Moreover, Kansas state courts in common fund cases are permitted in similar circumstances to determine reasonable fees equal to a percentage of the fund. *Gigot v. Cities Service Oil Company*, 241 Kan. 304, 737 P.2d 18 (1987) [Reasonable amount equal to 18% of helium settlement fund within discretion of trial court, which considered specified guidelines].

All these authorities lead to the conclusion that in common fund cases the trial judge has discretion to fix a reasonable fee as long as factors relevant to reasonableness are determined and considered. Whether a lodestar calculation itself is helpful under the circumstances is, in such cases, discretionary with the trial court. The experienced trial judge in this case carefully considered all pertinent guidelines, and the circumstances of the case which he had supervised from the beginning. The Tenth Circuit carefully reviewed the record, and was itself familiar first-hand with earlier appeals and records of earlier trials in this helium litigation.

The decision below correctly decided that the trial court had properly considered all relevant factors bearing on reasonableness, and that its considered judgment allowing litigation expenses and fees was not an abuse of discretion. The decision does not conflict with comparable common fund cases. It carries out sound public policy requiring courts to consider carefully all factors relevant to reasonableness before fixing the amount to be allowed as fees from a common fund.

And it is readily apparent that the trial court confirmed the reasonableness of the expense and fee allowance by comparing it with the lodestar methodology pre-

sented alternatively to it in the post-hearing requested findings. Petitioners' request that this case be remanded to require application of a specific lodestar calculation is plainly without merit. Any remand for that purpose obviously would not change the result.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Counsel of Record

APPENDIX

RULE 28.1 STATEMENT OF NON-WHOLLY OWNED SUBSIDIARIES AND AFFILIATES

ASHLAND OIL, INC.

Arch Mineral Corporation
Ashland Coal, Inc.
Etablissement Locab
Ashland-Otilub S.A. Industria Quimica
Super Mom's Kitchens, Inc.
B.V. Ashland-Suedchemie V/h Necof
CARBOGAL-Carbonos de Portugal SARL
Gravcap, Inc.
Iberia Ashland Chemical S.A.
Locap, Inc.
Loop, Inc.
Melamine Chemicals, Inc.
Minnesota Pipe Line Company
Parish Pipe Line Company
Saudi Industrial Resins Limited
Resource Sciences-Arabia Ltd.
Williams Brothers Canada Limited
Northern Engineering Services Company Limited
Wicmap Transport Pty. Ltd.
Resource Sciences Malaysia Sdn. Bhd.
Tecumseh Pipe Line Company
United Carbon India, Limited
Australian Carbon Black Pty. Ltd.
Malaysian Carbon Sdn. Bhd.
P.T. Indocarb
Negroven, S.A.
Ashland-Avebene
Ashland Croda Pty. Ltd.
Ashland De Mexico S.A. de C.V.
Ashland Resinas Sinteticas, Ltda.
Ashland-Suedchemie-Kernfest GmgH
Ashland-Suedchemie-Gremolith AG
George Hantos & Co, OHG
Kernfest-Webac, A.B.
Oleotecnica, S.A.

Arch Mineral Corporation
Medicine Bow Coal Company
Cresent Petroleum Company
Ashland Exploration (U.K.) Ltd.
Ashland Oil (Nigeria) Company
Cumberland Materials, Inc.
Ashland Coal, Inc.
Delmar Plaza Associates
Maplewood Corporation
Travelers Inns of Charlotte, Inc.
Travelers Inns of Winston-Salem, Inc.
Travelers Inns of Wytheville, Inc.
Mikropul G.m.b.H.
Transdutos Engenaria Limitada, S.A.
Seapac Chemical and Trading Co. (Pte.) Ltd.
Resource Sciences Gulf Limited
Williams Brothers Iran Consulting Engineers

ATLANTIC RICHFIELD COMPANY

Alyeska Pipeline Service Company
Anamax Mining Company
ARCO Chemical Company
ARCO Solar (Europe) GmbH
ARCO Solar Nigeria Ltd.
Arcobrasil Participacoes e Investimentos Ltda.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty. Limited
Compania Minera Dos Republicos S.A. de C.V.
Compania Petrolera Carco
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Curragh Coal Sales Co. Pty. Ltd.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Eisenhower Mining Company
FX Liquidation Corporation
Industrias Nacobre S.A. de C.V.
Iricon Agency Ltd.
Kenai Pipe Line Company

Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum, Inc.
Nordisk Mineselskab A/S
Platte Pipe Line Company
Prince Consolidated Mining Company
Rodman, Inc.
Showa Arco Solar Far East Pte Ltd.
Showa Arco Solar KK
Sinclair Venezualan Oil Company
Smoke House Copper Mining Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

CABOT CORPORATION

Austrialian Carbon Black Pty. Limited
Berylco Cabot Metaux Speciaux
Cabot Alloys (U.K.) Limited
Cabot Argentina Sociedad Anonima Industrial y Comercial
Cabot Belguim, S.A.
Cabot Carbon Limited
Cabot Columbiana, S.A.
Cabot do Brasil Comercia e Industria Limitada
Cabot Exploration International Corp.
Cabot France, S.A.
Cabot GmbH
Cabot Insurance Co., Ltd.
Cabot Italiana Societa per Azioni
Cabot Plastics Limited
Cabot S.A.
Cabot Safety Limited
Deloro Stellite (U.K.) Limited
Cabot Stellite Europe Limited
Capuava Carbonos Industriais, S.A.
Deloro Stellite AB
Deloro Stellite GmbH
Deloro Stellite Iberica S.A.
Deutsche Beryllium GmbH
Energy Transport Limited
High Performance Alloys Company

Ingal International Gallium GmbH
Iran Carbon Company, Ltd.
N.V. Kawecki-Billiton Metaalindustrie
Kawecki-Billiton (U.K.) Ltd.
KBI Export Corp.
Showa - KBI Co., Ltd.
Showa Cabot Kabushiki Kaisha
Tugfork Corporation
White Shoal Pipeline Corporation
Malaysian Carbon Sdn. Bhd.
Tantalum Mining Corporation of Canada, Limited
Materiaux et Produits Electroniques et Nucleaires S.A.R.L.
Nickel-Contor Deutschland GmbH
Nickel-Contor AG fur Nickel und Nickellegierungen
Cabot Alloys France
Technologica Vertriebsgesellschaft fuer technische Erzeugnisse GmbH

DAMSON OIL CORPORATION
(Formerly Dorchester Gas Corporation)

Damson Oil Corporation
D.O.C. Operating Services Corporation
D.O.C. Drilling Services Corporation
Doram Energy, Inc.
Damson Exploration Corporation
Damson Oil International
Damara Oil (Cameroon) Ltd.
Damson Securities Corporation
D.O.C. - Louden G.P. Corporation
D.O.C. - L.P. Corporation
Stinnett Oil Company
Damson Holding Corporation
Damson Oil Tower Corporation
Wyandotte Holding Corporation
Damson-Louden Title Holding Corporation
Damson Gas Processing Corp.
Damson Executive Rights Holding Corporation
DOC Development Drilling Corporation N.V.
Damson 82 Dev. 2 G.P. Corp.
Damson Consolidated Nominee, Inc.

Damson 1983-84 G.P. Corp.
Damson 1983-84 Limited Partner Corp.
Dorchester Gas Corporation
Damson Juniper Drilling, Inc.
Damson Properties, Inc.
Damson Institutional Series 82E-1 Corporation
Damson Institutional Series 82E-2 Corporation
Damson Institutional Series 83E-1 Corporation
Damson Institutional Series 83E-2 Corporation
Damson Institutional Series 83E-3 Corporation
Damson Institutional Series 84E-1 Corporation
Damson Institutional Series 84E-3 Corporation
Damson Institutional Series 84E-4 Corporation
Damson Institutional Series 85E-1 Corporation
Damson Investor Services Corporation
Damson Energy Nominee, Inc.
Dorchester Coal Company
Rosamond Drilling Company, Inc.
Dorchester Refining Company
Dorchester Exploration, Inc.

HELMERICH & PAYNE, INC.

Helmerich & Payne Properties, Inc.
Utica Square Shopping Center, Inc.
The Tearoom in Utica Square, Inc.
The Hardware Store in Utica Square
The Space Center, Inc.
H & P DISC, Inc.
Helmerich & Payne Coal Co.
Helmerich & Payne Finance, N.V.
Helmerich & Payne International Drilling Co.
Subsidiaries:
Helmerich & Payne, C.A.
Helmerich & Payne (Colombia) Drilling Co.
Helmerich & Payne del Ecuador, Inc.
Helmerich & Payne (Guatemala) Drilling Co.
Helmerich & Payne (Peru) Drilling Co.
Helmerich & Payne (Trinidad) Drilling Co.
Helmerich & Payne Rasco, Inc.
Helmerich & Payne de Venezuela, C.A.

TEXACO INC.

African Petroleum Terminals, Ltd.
American Overseas Petroleum Limited
Arabian American Oil Company
Badger Pipe Line Company
Caltex Deutschland GmbH
Caltex Mediterranean Limited
Caltex Petroleum Corporation
Colonial Pipeline Company
Coltexo Corporation
Deutsche Texaco Aktiengelsellschaft
Dixie Pipeline Company
Explorer Pipeline Company
Ful-Tex Euro Services Inc.
Kaw Pipe Line Company
Laurel Pipe Line Company
LOCAP Inc.
Loop Inc.
Neches Butane Products Company
Olympic Pipe Line Company
Pipelines of Puerto Rico Inc, The
P.T. Caltex Pacific Indonesia
Refineria Texaco De Honduras, S.A.
Skandinaviska Raffinaderi Aktiebolaget Scanraff
Sociedade Anonima de Oleo Galena-Signal
Societa Per Azioni Raffineria Padana Olii Minerali Sarpom
Texaco Angola-Prospeccao e Producao
Texaco Butadine Company
Texaco Canada Inc.
Texaco-Cities Service Pipe Line Company
Texaco Gabon
Texaco Ghana Limited
Texaco Inc.
Texaco Maroc
Texaco Mexicana
Texaco Nigeria Limited
Texaco Overseas (Nigeria) Petroleum Company
Texaco Togo
Texas-New Mexico Pipe Line Company

West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco Pipe Line Company
Zaire-Texaco S.A.R.L.

No. 87-1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILLIPS PETROLEUM COMPANY,
AMOCO PRODUCTION COMPANY and
CITIES SERVICE OIL AND GAS CORP.,
Petitioners,

v.

OLIVER S. BROWN, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS [1]

I. There Is A Clear Division Among The Circuits As To The Propriety Of A Percentage Attorney Fee Award.

The Tenth Circuit's decision below clearly departs from the fee methodology employed previously by other circuits in common fund cases. The decision is irreconcilable with the Second, Third and Eighth Circuits' decisions rejecting the percentage method for determining fee awards. The respondents' position that these other circuits will avoid a conflict by now overruling their own well established precedents for arriving at attorney fee awards in

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[1] Petitioners' listing of Parties is set forth on the Petition at p. ii, and in the petition appendix at pp. 44a-46a.

common fund cases is presumptuous. More importantly, it emphasizes that uncertainty and conflict among the federal courts will continue until this Court exercises its supervisory power.

In *In Re Agent Orange Product Liability Litigation*, 818 F.2d 216 (2d Cir. 1987), a common fund case, the Second Circuit reaffirmed its commitment to the lodestar formula for calculating attorney fee awards. In that decision, the court stated that "[a]dherence to these [lodestar] principles is essential not only to avoid awarding windfall fees to counsel, but also to 'avoid every appearance of having done so,' . . . ." 818 F.2d at 222, *citing*, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 469 (2d Cir. 1974). *See also*, *In Re Agent Orange Product Liability Litigation*, 818 F.2d 226, 232 (2d Cir. 1987) ("In order to provide counsel with [fair and just] compensation, and, at the same time, render these awards to prevent windfalls, we have adopted a lodestar formula for calculating fees in equitable fund and statutory fee contexts."). While perhaps reading *Blum v. Stenson*, 465 U.S. 886 (1984), as allowing courts greater freedom to adjust a lodestar in a common fund case, 818 F.2d at 234, it certainly did not waiver from its position on the lodestar.

The clear division between the Second and the Tenth Circuits will only widen if the decision below is left to stand. Certiorari should be granted.

II. Respondents' Reliance Upon *Brewer v. Southern Union Company* Is Misplaced.

Respondents support the award below by citation to an unreviewed decision of a district court. This reliance is ironic because the court in *Brewer v. Southern Union Co.*, 607 F. Supp. 1511 (D. Colo. 1984), made its award not by choosing a percentage, but instead by performing a lodestar calculation.

The differences between these cases supports the position of the petitioners that the award below is excessive and unreasonable. The funds in these two cases were approximately the same size. Hours spent, however, differed markedly. Approximately 18,000 hours were claimed to be spent in this action, while over 22,000 hours of attorney time were expended in *Brewer*. In addition, 17,865 hours of paralegal/clerk time and 6,019 hours of research consultant time were expended in *Brewer*. No similar expenditure of paralegal/clerk or research consultant time exists in this case.

More importantly, the award of 14 percent of the fund in *Brewer included* interim payments. The award in the present case is *in addition to* the sums counsel charged their clients as the case progressed. The respondents' brief cannot and does not justify one of the respondent counsel, who billed a client and received $200 for an hour of work in 1984, receiving from class members several times that amount for that same hour of work.[2]

III. The Percentage Method Results In A Virtually Unreviewable Award.

Merely picking a percentage of a fund to award as attorney fee results in an award that is virtually unreviewable. Labeling a percentage as "reasonable" allows a court to avoid deciding questions concerning the hours to compensate,[3] the hourly rates that would yield a reasonable

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[2] At the conclusion of the evidentiary hearing, the judge made "off the cuff" findings of appropriate multipliers. He stated that a multiplier of 2.5 was appropriate for lead counsel, and that other counsel deserved lower or no multipliers. These multipliers are below the corresponding multipliers found in *Brewer*.

[3] In its application in this case, lead counsel requested the award of attorney fees include compensation for 2,300 hours of work counsel performed for its client Ashland in an Oklahoma case Ashland brought on its own behalf against Phillips. Compensating this time was opposed by petitioners. Whether the district court com-

award, and whether to adjust a fee to reflect risk [4] or other factors.[5]

If controversies can exist as to hours, rates, and other *Johnson* factors, the resulting award cannot appropriately reflect those factors. The result is a truly irrational award.

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pensated lead counsel for it remains a mystery. The Tenth Circuit's decision approving a percentage award did not dispell the mystery. This is the reason that "claimed hours" are either approximately 18,000 as indicated in the petition, or 20,798 as claimed in the response.

[4] The risk borne by counsel of nonpayment of any attorney fees has not been identified. While lead counsel asserts that it billed only "minimal amounts from time to time, which would reimburse the law firm for office overhead," counsel also indicates that amount was at rates up to $200 per hour. See Response, pp. 3, 4. Certainly, any risk was diminished or disappeared after liability was settled by the Tenth Circuit in 1971. See *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704 (10th Cir. 1971).

[5] The statement that Cities "allowed class counsel to do all the work" is incorrect. Respondents admitted that they expressly excluded Cities from participation, and that Cities nonetheless continued to participate on its own behalf through its own counsel. R. Vol. Eight, Transcript of Hearing, March 6, 1985, pp. 186-187.

CONCLUSION

The questions presented in this petition represent real and important conflicts among courts. The Court should grant certiorari to resolve these conflicts.

Respectfully submitted,

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